90-410

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BRUCE COHN, individually, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a California corporation,

Petitioners,

v.

DAVID KATZ, individually, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Due Process Clause of the Fifth Amendment and Federal statutes allow a plaintiff to recover judgment on an *un*pleaded and *un*litigated theory of recovery, particularly when the theory contradicts unequivocal judicial admissions made by the plaintiff (and/or his counsel) in pleadings, a joint pretrial statement, and at the trial itself.

II. Whether the Due Process Clause of the Fifth Amendment and Federal statutes allow the second phase of a bifurcated jury trial to take place one and one-half years after the first phase, *before* (what is effectively) *a different jury* than the one which decided the first phase of the trial.

III. Whether the reduction (after a one-and-one-half year delay) in the number of jurors from the stipulated number of eight (8) to six (6) for the "damages" phase of a bifurcated trial constituted prejudicial error.

IV. Whether the Due Process Clause of the Fifth Amendment permits a plaintiff to recover emotional distress damages allegedly arising out of a defendant's good faith and reasonable denial of the existence of a contract.

LIST OF PARTIES

Petitioners (defendants below) are Bruce Cohn, Bruce Cohn Management, Inc. (a California corporation) and Danjoe Corporation (a California corporation).

Respondents (plaintiffs below) are David Katz, Katz-Cohn Productions, Inc. (an Arizona corporation), and Katz-Cohn Management, Inc. (an Arizona corporation).

Martin Cohn was a defendant and cross-complainant in the District Court, but is no longer a party to this action.

Petitioners are unaware of any parent or subsidiary corporations of the corporate parties set forth above.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Bruce Cohn, Bruce Cohn Management, Inc. and Danjoe Corporation respectfully petition this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Katz et al. v. Cohn et al.*, Docket Nos. 87-1874, 87-2477, 88-1641, 88-15626 and 88-15679.

OPINIONS BELOW

The unreported opinion and judgment of the United States Court of Appeals for the Ninth Circuit, and the unreported order denying petitioners' petition for rehearing are reprinted in the Appendix to this Petition. Said decisions

upheld the unreported opinions, judgments and orders of the United States District Court for the Northern District of California, which are also reprinted in the Appendix to this Petition.

JURISDICTION

The U.S. Court of Appeals For the Ninth Circuit affirmed the District Court's Judgment(s) on April 17, 1990 in an unpublished decision. Petitioners filed a timely Petition for Rehearing on May 1, 1990, and on June 4, 1990, the Ninth Circuit denied the Petition for Rehearing (also in an unpublished opinion).

The current Petition for Writ of Certiorari is timely by virtue of 28 U.S.C. Section 2101(c) and Supreme Court Rules 13.1 and 13.4. Jurisdiction is founded upon 28 U.S.C. Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves, but is not limited to, the application of the Fifth and Seventh Amendments to the U.S. Constitution as well as Federal Rules of Civil Procedure 15(b), 16(e), 38(a)-(d), 48, 49(a) and 54(b). The relevant portions of these Statutes and Constitutional Provisions are reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

Summary of Procedural Background

The parties were arguing over the right to manage certain rock stars, notably the group "Night Ranger", based on an oral agreement that was very specifically alleged to be formed in 1982.

Before trial, the trial judge *sua sponte* dismissed various counts in the complaint. *sua sponte* the trial judge decided liability and damages should tried separately.

Respondents' counsel, in keeping with the complaint and the pretrial statement, presented evidence on an oral 1982 agreement and requested that the jury find that this very specific agreement existed. *The jury didn't.* Instead, it found, *sua sponte,* that another agreement (of some sort) was reached in 1983. *sua sponte,* the trial judge then supplied the missing key terms to the (different) 1983 agreement.

The trial court then adjourned the proceedings for one and a half *years!!* The remaining damage phase of the case was tried to a reduced number of jurors (6) after that year and a half had passed.

Petitioners regularly, properly and repeatedly objected to the trial court's irregular and improper handling of this case.

Detailed Procedural Background

This was a diversity action filed on August 1, 1984, in the U.S. Court for the Northern District of California by respondent David Katz (both individually and on behalf of his corporations, Katz-Cohn Productions, Inc., and Katz-Cohn Management, Inc.) against Martin Cohn and petitioner Bruce Cohn (and two of Bruce Cohn's corporations, petitioners Bruce Cohn Management, Inc., and Danjoe Corp.).

The complaint[1] alleged ten (10) counts (for fraud, breach of contract, etc.) variously directed at Martin Cohn,[2] Bruce Cohn, and Bruce Cohn's corporations. The causes of action directed against Bruce Cohn and his corporations (hereinafter collectively referred to as "petitioners") were based upon certain alleged breaches of a purported oral joint venture agreement.

The complaint specifically alleged that the alleged agreement was entered into in the Fall of 1982 and not in the

[1] *See* Appendix, page A-48.

[2] The action against defendant Martin Cohn was dismissed prior to trial, pursuant to a settlement.

Spring of 1983, and sought (among other things) damages (e.g., moving expenses) allegedly caused in 1982 by the purported breach of contract. This position was consistently adhered to by respondents throughout pretrial discovery, in the *joint* pretrial statement, and at the trial itself.

On January 5, 1987, the case went to an eight-person jury trial before Judge William H. Orrick, Jr. Judge Orrick decided *sua sponte* to bifurcate the trial as to liability and damages, and the trial proceeded on that basis.

On January 7, 1987, petitioners brought a motion [pursuant to Rule 50(a) of the Federal Rules of Civil Procedure] for a directed verdict, based upon the grounds that the alleged joint venture contract was illegal (and unenforceable), ambiguous, and uncertain. Judge Orrick took the motion under submission, and dismissed the charges of fraud and deceit (as well as respondents' claims for punitive damages) *sua sponte.*

At the conclusion of the liability phase of the trial (during which the parties and the court were still operating under the assumption that the respondents' case was founded upon a purported Fall, 1982 agreement), the jury found liability on the basis of petitioners' breach of an (*un*pleaded and *un*argued) February 4, 1983 joint venture contract, rather than on the (pleaded and argued) Fall, *1982* agreement.

The special verdict form used by the jury contained no mechanism by which the jury could make findings as to the terms of the February 4, 1983 contract; and, accordingly, the jury made no such findings. The jury did find, however, that the terms were not those allegedly contained in the pleaded Fall 1982 agreement.

Petitioners brought appropriate post-trial motions under Rules 50 and 59(a) of the Federal Rules of Civil Procedure. The trial court denied these defense motions on January 29, 1987. Judge Orrick's ruling was subsequently formalized into memorandum opinions and orders.

In the course of denying the defense motions, Judge Orrick, acting without the jury, made various supplemental

findings as to certain critical terms of the purported joint venture agreement (such as terms concerning the division of joint venture profits). These supplemental findings were also formalized in said memorandum opinions and orders in the supplemental order of July 8, 1987, and in the court's judgments of December 7 and December 17, 1987.

Petitioners timely appealed from this first phase of the bifurcated trial.

After Judge Orrick had made his findings as to the terms of the alleged joint venture agreement, the computation of one element of the damages alleged (i.e., profits derived from the management of a popular music group known as "Night Ranger") could be done fairly mechanically. Consequently, without waiving his objections to Judge Orrick's earlier rulings, petitioners' counsel stipulated to having this one element of the damages determined by a Special Master.

Pursuant to this arrangement, Special Master Austin took evidence as to the "Night Ranger" profits and expenses, and made findings as to the amounts owed by petitioners to respondents (based on the contractual terms determined by Judge Orrick). These findings are set forth in the December 2, 1987 Decision of Special Master, and were made a part of the District Court's December, 1987 Judgment and Amended Judgment.

After the entry of the judgment(s), petitioners brought a motion for a new trial, which was denied by Judge Orrick in February of 1988.

As noted, the accounting was only set up to deal with one element of respondents' alleged damages—a share of the "Night Ranger" profits. When the first phase of the trial was concluded on January 12, 1987, Judge Orrick informed the eight (8) members of the jury that they might be called back to decide the balance of the issues in the case.

For more than one (1) year, neither respondents, nor the District Court took steps to reconvene the jury to decide these issues. Indeed, it appears that the matter might have remained in limbo forever, had not petitioners' counsel

brought the issue to Judge Orrick's attention in February of 1988.

After some indecision as to whether and how the "damages" phase of the trial was to be handled, Judge Orrick set the "damages" phase of the case for trial.

Petitioners brought timely motions *in limine* to conclude trial and to dismiss the remainder of the case, based on the delay in prosecution, the unavailability of several of the original jurors, etc. The motion was denied in part and granted in part. Judge Orrick ordered that the "damages" phase of the trial would be limited to the issue of emotional distress damages only.

The damages phase of the trial was held on July 13, 1988. This was some one and one-half years after the first phase of the bifurcated trial. Only six (6) of the original eight (8) jurors could be found by Judge Orrick, so the "damages" phase of the trial was heard by a six person jury.

Petitioners proposed that certain jury instructions be used, but the court elected to use jury instructions of its own design, over petitioners' objections. Among other things, Judge Orrick instructed the jury that a breach of fiduciary duty is always an intentional act, and that if petitioners' breach of fiduciary duty caused plaintiff Katz substantial financial injury, then an award of emotional distress damages was appropriate.

Plaintiff Katz testified that he did suffer emotional distress as a result of his inability to share in the "Night Ranger" profits, and to participate in the management of the purported joint venture.

Petitioners sought to introduce evidence as to the fact that defendant Bruce Cohn acted in good faith in asserting the non-existence of the purported joint venture. However, petitioners were prevented from doing so by Judge Orrick.

The jury ultimately awarded plaintiff Katz the sum of $55,000.0 in emotional distress damages. Judgment was entered in this amount on August 12, 1988.

Petitioners filed timely appropriate post-trial motions which were denied by Judge Orrick on October 27, 1988. Petitioners and respondents then filed timely notices of appeal and cross-appeal.

Factual Background

Petitioner Bruce Cohn is (and at all times relevant hereto was) a licensed artists' manager [RT 534 (lines 11-23)],[3] who has made a successful[4] business of managing the careers of musicians and other musical artists. (RT 464-468 and 512-514). It was undisputed that prior to the events at issue herein, Bruce Cohn had operated his business on his own (i.e., without partners), and he consistently denied forming any manner of partnership or joint venture with respondents (RT 479-482).

Plaintiff David Katz is (and was) a real estate broker and developer working out of a family company founded by his father, Bernard Katz (RT 69-70). Plaintiff Katz was acquainted with Bruce Cohn and Martin ("Marty") Cohn, because the Cohn brothers were his wife's cousins (RT 70-71).

In 1982, plaintiff Katz (who was apparently going through an unsuccessful period in his real estate business—see RT 72-73), decided to make a career change, and entered into the music business (by forming a partnership with Marty Cohn) RT 70-74.[5] It was *un*disputed that Plaintiff Katz had no experience or expertise in the music industry, and that

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[3] For purposes of this petition, "RT" (except as otherwise indicated) refers to the reporter's transcript of the January, 1987 "liability" phase of the trial.

[4] Among Bruce Cohn's more notable successes was a musical group known as "The Doobie Brothers," which has sold in excess of forty-five million records [RT 465-468 (especially RT 467)]. The undisputed evidence indicated that at the time the Doobie Brothers disbanded (which was shortly before the joint venture negotiations began), Bruce Cohn had several hundred thousand dollars in the bank, and was still actively engaged in the profession of managing musical artists (RT 512-514).

[5] Respondent Katz and *Marty* Cohn formed two corporations, known as Katz-Cohn Productions, Inc. and Katz-Cohn Management, Inc. (hereinafter collectively referred to as "Katz-Cohn," "the partnership," or "the David Katz-Marty Cohn partnership"). *Id.*

the musical artists "managed" by David Katz and Martin Cohn never yielded any profits to the David-Katz-Marty-Cohn partnership (RT 74, and 176-182).

Marty Cohn (who is no longer a party to this action) did have some experience in the music industry, primarily as a talent scout and artists' manager (RT 344-346). Marty Cohn's career was apparently less than successful, however, as he borrowed (and never fully repaid) large sums of money from Bruce Cohn over the years [RT 394 (lines 11-23) and 497 (lines 6-19)].

Beginning sometime in 1982,[6] and continuing for several months thereafter, defendant Bruce Cohn had a series of discussions with plaintiff Katz and Marty Cohn concerning a possible joint venture (in the music business) between the David Katz-Marty Cohn partnership and Bruce Cohn.

Respondents contended below that these negotiations resulted in an *oral* joint venture agreement on or about November of 1982, and that the purpose of this joint venture was managing, producing and publishing the work of artists and performers (including, but not limited to a musical group known as "Night Ranger") in the field of musical entertainment [see, *e.g.*, paragraph 6 of the Complaint (Appendix, page A-50) and RT 79-83 and 133-136].

Respondents further contended that this oral joint venture agreement was orally modified on or about December of 1982 [see, *e.g.*, paragraph 7 of the Complaint (Appendix, pages A-50 and A-51) and RT 88-91], and that they suffered significant damages in *1982* caused by the petitioners' purported breach of contract.

Petitioners denied entering into any such agreements with respondents at such times (or at any other times, [see *e.g.*, testimony of Bruce Cohn (RT 419-423, 429-430 and 479-486) and his attorney Robert Gordon (528-533)].

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[6] There was conflicting evidence as to when the discussions began. Bruce Cohn testified that they began in September or October of 1982 (RT 469-479), while respondent Katz testified that they began in May of 1982 (RT 73-76).

The evidence was *un*disputed that the parties continued to engage in negotiations concerning the purported joint venture in 1983, most notably during a protracted meeting [between plaintiff Katz, Marty Cohn, Bruce Cohn, their respective counsel (Mr. Diamond and Mr. Gordon), and certain accounting and clerical personnel] on February 4, 1983. It was also *un*disputed that these later negotiations did *not* result in an agreement, and were *not* the basis of respondents' action against petitioners. see, *e.g.* paragraph 9 of the Complaint (Appendix, page A-51), testimony of plaintiff Katz (RT 260, lines 20-24).

REASONS FOR GRANTING THE PETITION

More than a century ago, this Court held that unequivocal admissions made by counsel during the course of a trial constitute *binding* judicial admissions. *Oscanyan v. W.R. Arms Co.*, 103 U.S. 261, 263-266 (1881). Controlling Federal case law (including that of the Ninth Circuit itself) also unequivocally holds that the judicial admissions doctrine applies to statements made in pleadings, pre-trial statements and testimony at trial.

In addition, applicable law (including the Due Process Clause of the Fifth Amendment) unambiguously provides that a civil defendant is entitled to reasonable notice of the claims made against him, and a reasonable opportunity to defend himself against such charges.

By allowing the respondents to recover on the basis of a contract which respondents *and* their counsel admitted did not exist, and on related theories which were neither pleaded, nor even litigated, the Ninth Circuit and the District Court have engaged in an extreme departure from the accepted and usual course of judicial proceedings, and have flouted the principles of *stare decisis*.

The Ninth Circuit has also countenanced a procedure under which the District Court allowed more than one and one-half years to transpire between the two intertwined phases of a bifurcated jury trial.

This second unprecedented departure from accepted judicial practices resulted in a loss of two (2) of the stipulated eight (8) jurors, and (due to the inevitable loss of memory which occurred during the long intervening time span) had the result of a bifurcated trial before what was, in essence, two (2) different juries.

Such a result is not only fundamentally unfair and improper, but is also a violation of the principles established by this Court in the controlling case of *Gasoline Prods. Co. v. Champion Ref. Co.*, 283 U.S. 494, 500 (1931).

I. THE JUDGMENT MUST BE REVERSED, AS IT IS FOUNDED SOLELY ON FACTS, ISSUES, AND THEORIES OF RECOVERY WHICH WERE ABSENT FROM RESPONDENTS' COMPLAINT AND PRE-TRIAL STATEMENT, AND AS IT CONTRADICTS BINDING JUDICIAL ADMISSIONS MADE BY RESPONDENT KATZ AND HIS COUNSEL

A. "Loose" Requirements of Notice Pleading Still Do Not Allow An *Un*-pleaded Ambush!

Even under the liberal standards set forth in the Federal Rules of Civil Procedure, the complaint *must* give the defendant fair notice of the claim asserted. *Joiner Systems, Inc. v. AVM Corporations, Inc.*, 517 F.2d 45, 47-48 (3rd Cir. 1975); 2A Moore's *Federal Practice*, Section 8.13, pages 8-61, 8-62 (2nd ed. 1987).

Basing a judgment on issues which were neither raised in the complaint nor tried with the consent of the defendant constitutes reversible error. *Joiner Systems, Inc. v. AVM Corporations, Inc.*, 517 F.2d 45, 47-49 (3rd Cir. 1975). See *Westinghouse Elec. v. CX Processing Labs.*, 523 F.2d 668, 672-673 (9th Cir. 1975); *Valentine v. Aetna Ins. Co.*, 564 F.2d 292, 295 (9th Cir. 1977). *See, e.g., Consolidated Data Terminals v. Applied Digital Data Systems*, 708 F.2d 385, 395-399 (9th Cir. 1983) [trial court committed reversible error in allowing late pleading amendments (and ultimately, recovery) on issues which were neither pleaded, nor tried by

consent]; *Meschino v. North American Drager, Inc.*, 841 F.2d 429, 434-436 (1st Cir. 1988) [court committed reversible error in granting defense motion for directed verdict based on issue omitted from both defendant's answer and pretrial statement].

In the instant case, respondents' complaint clearly indicated that respondents' claims were based upon the joint venture contract allegedly made "on or about" November 1, *1982* (and then modified in December of *1982*). Indeed, the complaint affirmatively alleged that the Spring, *1983* negotiations did not result in a new agreement or any modifications to the existing agreement.[7]

Principles of due process limit the scope of any fact/condition that is alleged to have occurred "on or about" a certain date. Elsewise litigation by ambush or surprise would be countenanced.

Applicable case law unambiguously holds that the phrase "on or about" does not put time at large. Rather, the phrase is used to indicate that the date is stated with approximate certainty, and means "approximately," "about," "without substantial variation from," or "near." *Crawford v. Arends*, 176 S.W.2d 1,4 (Mo. 1943); 67 C.J.S. *On; Upon*, pages 866-867 (1978).

See, *e.g.*, *U.S. v. McCown*, 711 F.2d 1441, 1450 (9th Cir. 1983) ["on or about" construed to open time frame by no more than one or two days]; *Gittner-Louviere Engineering v. Superior Court*, 565 Pac.2d 915, 918 (Ariz.App. 1977) ["on or about" could not be construed to mean more than a few days either way]; *Joy v. Peacock*, 131 S.W.2d 1012, 1016-1017 (Tex.App. 1939), overturned on other grounds 153 S.W.2d 440 (Tex. 1941) [a finding that an event occurred "on or about" a certain month cannot be construed accurately as

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[7] Paragraph 9 of the complaint (*see* Appendix, page A-51) provides in relevant part:

"...At or about the same time [on or about March of 1983], Bruce Cohn proposed several major modifications to the joint venture agreement which were *rejected and the parties continued to operate the joint venture as before*" (emphasis added).

later than the last of said month in fairness to the party adversely affected]; *State v. Armstead*, 283 S.W.2d 577, 582 (Mo. 1955) ["on or about" meant less than a one week variation in time] *State v. Reagan*, 654 S.W.2d 636, 641 (Mo.App. 1983) ["on or about" a certain date was inclusive of up to five days variance].

Unless this Court is prepared to strip civil litigants of their rights under the Fifth Amendment, the law cited above requires that "on or about" December of 1982 may not be construed as going beyond December 31, 1982. This is particularly true herein, as petitioners reasonably believed (due to the fact that the December, 1982 date was based on a series of meetings distinctly separate from the February 4, 1983 meeting) that any meetings *after* December of 1982 were outside the purview of respondents' claims.

Compare: *U.S. v. Heard*, 443 F.2d 856, 859-860 (6th Cir. 1971) [use of phrase "on or about" in indictment did not mislead or otherwise prejudice defendant, where defendant knew well prior to trial that date two days prior to "on or about" date alleged in indictment was highly-pertinent to the charges set forth in the indictment].

Based on these allegations (which, as is discussed in more depth elsewhere herein, were echoed in the *joint* pretrial conference statement, and in plaintiff David Katz's *own* trial testimony), petitioners had no inkling that *any* claim was being asserted regarding an agreement reached at the February, 1983 negotiation meeting. Consequently, petitioners (quite reasonably) did not focus their energies at trial on the details surrounding the February, 1983 meeting, but rather devoted their efforts to the issues pertaining to the *pleaded* 1982 agreement.

Under such circumstances, the entry of judgment against petitioners on an entirely unpleaded[8] and virtually unlitigated

[8] It should be noted that respondents never moved [in accordance with Federal Rule of Civil Procedure 15(b)] to amend the complaint to conform with proof. In the absence of such a motion (as well as the absence of any clear notice to petitioners that the unpleaded theory of recovery was being litigated), the complaint *cannot* be deemed amended. See: *Trinity Carton*

theory of recovery was a violation of fundamental principles of due process. *See, e.g., Meschino v. North American Drager, Inc.*, 841 F.2d 429, 434-436 (1st Cir. 1988) [trial court abused its discretion in granting defendant's motion for directed verdict, where motion was based upon issue which had been admitted in petitioners' answer and which was not listed in pretrial statement as an issue to be tried]. Consequently, on this basis alone, the judgment must be reversed. *Id.*

B. Say Goodbye to Due Process Protection of Pretrial Statement[9]

Pretrial orders must be honored and enforced to achieve the objectives of simplifying issues, avoiding unnecessary proof, and preventing unfair surprise at trial. The way the trial court ignored the pretrial trial statement in this case is a textbook example of why those statements *must* be binding if constitutional protections are to be accorded to civil litigants.

Consequently, particular evidence or theories which are not at least implicitly included in the order are barred unless

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Co. v. Falstaff Brewing Corp., 767 F.2d 184, 193 (5th Cir. 1985); *Campbell v. Trustees of Leland Stanford Jr. Univ.*, 817 F.2d 499, 506-507 (9th Cir. 1987). In any event, the lower court would not have been empowered to grant such a motion under the facts of this case, as to do so would have resulted in substantial prejudice to petitioners. *Consolidated Data Terminals v. Applied Digital Data Systems*, 708 F.2d 385, 396-397 (9th Cir. 1983).

[9] Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the District Court's Local Rule 235-7, and the District Court's order of March 21, 1986, respondents and petitioners defendants submitted a joint pretrial statement. The trial judge did not, however, enter a pretrial order.

In the absence of such an order, the pretrial statement itself fulfilled the same function as a pretrial order, and limited the issues at trial to those set forth in the pretrial statement. 3 Moore's *Federal Practice*, Section 16.18, pages 16-58, 16-59 (2nd ed. 1987). *See, e.g., Valentine v. Aetna Ins. Co.*, 564 F.2d 292, 295 (9th Cir. 1977) [trial court properly refused to consider theory which had not been raised in pleadings or pretrial statement]; *Knight v. Otis Elevator Co.*, 596 F.2d 84, 89 (3rd Cir. 1979) [trial court properly precluded arguments concerning theory not directly asserted in pretrial memoranda]; *Consolidated Data Terminals v. Applied Digital Data Systems*, 708 F.2d 385, 396-399 (9th Cir. 1983) [trial court committed reversible error in allowing recovery on theories which were not set forth in pleadings or pretrial statement].

(as was not the situation herein) the order is first modified in accordance with Federal Rule of Civil Procedure 16(e).[10] *United States v. First Nat. Bank of Circle*, 652 F. 2d 882, 886-887 (9th Cir. 1981); 3 Moore's *Federal Practice*, Section 16.19 (2nd ed. 1987).

This result (i.e., the barring of undisclosed evidence and/or theories) is a logical consequence of the general rules that the pretrial order controls the subsequent course of action in the litigation [*Eagle v. American Tel. and Tel. Co.*, 769 F.2d 541, 548 (9th Cir. 1985)] and that issues not preserved in the pretrial order are eliminated from the action [*Southern Cal. Retail Clerks Union v. Bjorkland*, 728 F.2d 1262, 1264-1265 (9th Cir. 1984); *Hotel Emp., Et al. Health Trust v. Elks Lodge, 1450*, 827 F.2d 1324, 1328-1329 (9th Cir. 1987)]. *See, e.g., Erff v. Markhon Industries, Inc.*, 781 F.2d 613, 617-619 (7th Cir. 1986) [plaintiff's alternative theory of recovery, which was not raised at the pretrial conference, was deemed waived].

In the instant case, the joint pretrial statement clearly stated (in relevant part—see Appendix, page A-64) that:

> "Plaintiffs allege that in the fall of 1982 a joint venture was formed among Katz, Martin Cohn and their companies, and Martin Cohn's brother, Bruce Cohn, and his company, Bruce Cohn Management, Inc., for the purpose of managing and producing popular music artists . . . Plaintiffs allege that the joint venture operated until the spring of 1983 when Bruce Cohn repudiated the joint venture" (emphasis added).[11]

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[10] Respondents made no attempt below to modify the pretrial statement so as to include the theory of recovery upon which the verdict of liability was based. Had such a request been made, the trial court would have been compelled to carefully evaluate a number of factors, such as the resulting prejudice to petitioners, *before* acting on the request. *United States v. First Nat. Bank of Circle*, 652 F.2d 882, 887 (9th Cir. 1981).

[11] Section (e) of the joint pretrial statement (see Appendix, page A-65) listed as one of the disputed factual issues:

> "1. Whether a joint venture was formed between plaintiffs and defendants and, if so, its terms."

This position (i.e., that respondents' claims were based on a joint venture agreement entered into prior to the February, 1983 negotiation meeting) was consistently adhered to by respondents at trial. Indeed, on cross-examination at trial, plaintiff Katz expressly stated that the claim he was asserting was based solely on an agreement reached prior to the February, 1983 negotiating session[12]—a position which was echoed by respondents' counsel at many points during the trial,[13] and which also reflected the trial judge's view of the case.[14]

In light of the above, it cannot be seriously argued that petitioners had *any* notice (let alone *clear* notice) of the alternative theory of recovery upon which respondents were allowed to prevail, and it would be ludicrous to say that the issue had been tried with petitioners' knowledge and consent.[15] As one court noted under similar circumstances:

Interpreting the joint pretrial statement as a whole, the parties were clearly referring to the alleged fall, 1982 agreement, however, as section (c) ("Substance of the Action") of the joint pretrial statement referred specifically (and exclusively) to that fall, 1982 agreement. Consequently, as the joint pretrial statement did not contain even an *implicit* reference to a 1983 agreement, any theory of recovery based on such an agreement was barred. *See Eagle v. American Tel. and Tel. Co.*, 769 F.2d 541, 548 (9th Cir. 1985).

[12] Petitioners' counsel, Mr. Birenbaum, asked respondent Katz:

> "So it is the agreement that is reflected by the December 22nd [1982] letter—that is what your are complaining of here in this court—*and nothing beyond that point*; is that correct? *No agreements beyond that point*" (emphasis added).

To which respondent Katz replied, "That's correct." RT 260, line 20-24 (emphasis added).

[13] *See, e.g.*, RT 648 (lines 14-20), 649 (lines 813), 651 (lines 5-11), 678 (lines 7-10), 687 (lines 9-13), and 690 (lines 17-23). Moreover, respondents' counsel expressly stated during his closing argument that the February 4, 1983 meeting was a "red herring" and "doesn't have anything to do with the case." Rt 685, lines 12-17 (emphasis added).

[14] *See* RT 649, lines 1-5.

[15] Indeed, respondents' counsel admitted as much to the court after the jury came out with its verdict. RT 754, lines 1-5. The record clearly reflects that petitioners' counsel thought that plaintiffs' case was based upon the alleged Fall, 1982 agreement (*see, e.g.*, RT 709-712), and that peitioners' counsel (like respondents' counsel) was shocked and surprised when the jury found for respondents based on the unlitigated February 4, 1983 "agreement" (*see* RT 755-757).

> Appellant reasonably based its defense on the last pretrial indication of appellee's position. In the absence of a pretrial order to the contrary, we must assume that the pretrial memorandum represented the parties' and the court's consensus on the theory for liability. If the court was going to reject this position, it should have done so before trial. To do so after the submission of evidence, was an abuse of discretion.

Price v. Inland Oil Co., 646 F.2d 90, 96-97 (3rd Cir. 1981).

In the instant case, as in the *Price* case, the judgment should be reversed, and judgment entered for petitioners.[16]

C. The Trial Court May Not Enter a Judgment Contrary to Judicial Admissions.

A judicial admission is not merely evidence of a fact, but rather is a conclusive concession of the truth of such a matter. *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Consequently, such an admission has the effect of *removing* said issues from the action. *Id. See, e.g., Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 550-551 (6th Cir. 1986) [judicial admissions contained in answer conclusively established that party was an employer for purposes of Fair Labor Standards Act]; *Davis v. A.G. Edwards and Sons, Inc.*, 823 F.2d 105, 107-108 (5th Cir. 1987) [judicial admissions in pleadings conclusively established that investors learned of alleged "churning" of accounts on a certain date].

Findings contrary to such judicial admissions must be disregarded, and judgments entered in reliance on said improper findings must be reversed. *See, e.g., Meschino v. North American Drager, Inc.*, 841 F.2d 429, 434 (1st Cir. 1988) [trial court committed reversible error by granting defense

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[16] The jury below found that no joint venture contract was entered into by the parties prior to February 4, 1983. As respondents' case was founded solely on an agreement allegedly made in late 1982, judgment should have been entered for the petitioners. *Price v. Inland Oil Co.*, 646 F.2d 90, 97-99 (3rd Cir. 1981).

motion for directed verdict, based on plaintiff's failure to prove matter which was admitted in defendant's pleadings].

As was discussed at length elsewhere herein, the record is replete with unequivocal statements (in the complaint, pretrial statement, trial testimony, etc.) by plaintiff Katz and/or his counsel that respondents' claim was founded *solely* upon the alleged December, 1982 oral joint venture agreement, and that the subsequent negotiations (including, but not limited to, the February 4, 1983 meeting) did *not* result in an agreement, and that respondents' claims were based solely on an agreement reached prior to the February 4, 1983 negotiating session. *See, e.g.*, RT 648 (lines 14-20), 649 (lines 8-13), 651 (lines 5-11), 678 (lines 7-10), 685 (lines 12-17), 687 (lines 9-13) and 690 (lines 17-23).

It has long been the law in the Federal Courts that unequivocal admissions made by counsel during the course of a trial are treated as *binding* judicial admissions. *Oscanyan v. W.R. Arms Co.*, 103 U.S. 261, 263-266 (1881).

Compare Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481, 484 (3rd Cir. 1965) [ambiguous statements by counsel did not constitute judicial admissions].

Federal case law also holds that such unequivocal statements made at trial by the parties themselves constitute conclusively-binding judicial admissions. *See Backar v. Western States Producing Co., 547 F.2d* 876, 880 (5th Cir. 1977). *Cf. Fox v. Taylor Diving and Salvage Co.*, 694 F.2d 1349, 1355-1356 (5th Cir. 1983) [plaintiff was precluded from presenting a theory of recovery resting on the Jones Act, in view of his silent assent to a theory of non-Jones Act coverage propounded by his own expert witness].

As plaintiff Katz clearly and unambiguously testified at trial that he was not suing on any contracts entered into after 1982, the judicial admissions doctrine barred the jury and the trial court from awarding any recovery on the purported 1983 contract. *Id.*

In light of the judicial admissions made in the complaint, the joint pretrial statements, and at the trial itself, it is

apparent (as a matter of *law*) that the issue of a post-1982 joint venture agreement was eliminated from the case. Consequently, the jury's verdict (finding the existence of a February 4, 1983 contract) must be reversed. *Meschino v. North American Drager, Inc.*, 841 F.2d 429, 434-436 (1st Cir. 1988).

II. PETITIONERS WERE DENIED DUE PROCESS IN THIS CASE, BECAUSE THE RECONVENED JURY IN THE SECOND PART OF THE BIFURCATED TRIAL WAS IN NEITHER BODY NOR MIND THE SAME JURY WHICH HEARD THE FIRST PART.

A. A One and a Half Year Lapse Between the Parts of a Bifurcated Trial, Where the Parts are Inextricably Intertwined, Will so Affect the Continuity of the Trial as to Render Unreasonably Uncertain the Ability of the Jury to Function in a Way Consistent with Fundamental Fairness to the Litigants.

That human memory grows dimmer with time is an unassailable truth. This must be especially so when facts to be remembered are complicated and there is no particular reason for ever recalling them during any extended interlude in the process.

In the case at bar, the jury was released in January, 1987, after the first (liability) trial phase was concluded; they were recalled for the second (damages) part in July, 1988, nearly a year and a half later.

Can it be seriously argued that the individual jurors, during their year and a half of unwitting furlough from duty, could (or even wanted to) remember significant dates, places and event sequences, let alone recall the deeper nuances of their many evidentiary impressions perceived during the first trial? And it was upon such impressions that they would necessarily have had to rely in the second trial, because of the issues involved in this case.

The interwoven connection between facts giving rise to liability and those producing damage is more pronounced in

actions for emotional distress than in any other area of law, perhaps with the exception of claims for punitive damages. The first trial dealt with liability, and, because emotional distress was claimed, any jury would of necessity have to evaluate the alleged acts of liability within the factual context of their occurrence. It would be otherwise impossible to evaluate damages of so subjective a nature as those arising from emotions gone awry.

To remove by a year and a half an understanding of liability from the assessment of damages is to place a temporal barrier between cause and effect that is inevitably fatal to a fair determination of any emotional distress case. Because of the very substance of what is being sought and the reasons for it, is there any question but that the circumstances surrounding the causes of emotional distress are critical to an evaluation of their effect? Here, proof of the cause was a year and a half on the shelf, and just too stale to be of any fair or meaningful value in giving necessary flavor to the effect—the kind of flavor that makes a damage claim for emotional harm palatable to the intellectual process.

Upon their release from the first trial, jurors were told by the trial judge that he did not know if they would ever be needed again, and, from the tenor of his overall remarks, it would be reasonably inferred that, if so needed, they would soon know. (See RT 762-763).

Conversely, with no word for a year and a half, the only reasonable inference during that time span would be that the jury was no longer needed—another reason for jurors to let go of the last strands of meaningful memory of the first trial, even indeed, if such memory had not already become unmanageably tenuous or non-existent in the first place.

What trial counsel faced, therefore, in the second trial was, for all intents and purposes, a *new* and different jury. The only cases even remotely concerning the somewhat unique factual situation at hand deal with the impaneling of a new jury in the second part of a bifurcated trial or with the propriety of the bifurcation itself. Petitioners could find no case even commenting on the kind of procedural morass that

developed in this case. But, the few significant opinions there are regarding juries in split trials should analogously useful in any event.

The general rule seems to be that, while there is no constitutional impediment to having a new jury in the second phase of a bifurcated trial [*O'Donnell v. Watson Bros Trans. Co.*, 183 F.Supp. 577, 584-586 (N.D. Ill., 1960)], there is nevertheless a general due process requirement that the jury be the same from start to finish, where the issues between the two bifurcated parts are so intertwined as to render it unfair or unjust to try the case to a new jury in the second part. See, *Gasoline Prods. Co. v. Champion Ref. Co.*, 283 U.S. 494, 500 (1931); *Franchi Const. Co. v. Combined Ins. Co. of America*, 580 F.2d 1, 6-8 (1st Cir. 1978).

See, *e.g.*, *United Airlines, Inc. v. Wiener*, 286 F.2d 302, 304-306 (9th Cir. 1961), cert denied 366 U.S. 924 (trial court erred in ordering issues of liability and damages to be tried before separate juries, where issues were so interwoven that confusion and uncertainty would result).

In the case at bar, two identical factual questions are central to the issues of both liability and damages—the substantive good or bad faith quality of petitioners' conduct and the net effect of such conduct on the respondents in terms of damage, including emotional distress.

For a working appreciation of these pivotal issues, nearly everything learned at the first trial (e.g., the individual situations of the parties, their relationship and dealings with each, events leading up to the alleged agreement and the events surrounding their separation, etc.) would all be absolutely *essential* for each juror to have in mind before the damages part of the case had begun. Have in mind—Hardly, in view of the procedural backdrop of this case!

B. Since the jury could not be reimpaneled as originally constituted for the second trial because of an unduly extended interlude (through no fault of petitioners) between trials, the petitioners were effectively denied the jury they chose.

It was counsel for petitioners' understanding, when they stipulated to jury matters, that they were agreeing to an eight-person jury, with a minimum quorum of six (should any two of the eight-person panel, in the normal course of things, be relieved from duty due to illness or other form of unexpected incapacity). Two of the original jurors *were* absent at the second part of this bifurcated proceeding—not because of incapacity, but rather because they could not be located after a year and a half.

In the jury selection process at the commencement of the first proceeding, petitioners' voir dire evaluation of each juror was predicated upon a normally-paced trial and peremptory challenges made accordingly—that is, from petitioners' standpoint, the jury's overall profile was fashioned under the reasonable belief that, from start to finish, the jury would operate with procedural continuity, exposing them to the factual continuum required to arrive at an intelligent and just decision.

Any trial lawyer who has ever sat through more than one jury selection knows that precise formulas and stratagems quickly yield to visceral choice—you are satisfied with a jury when, even after being offered the next peremptory challenge, it just feels right, all things considered. Here, the eight finally impaneled were acceptable to petitioners' trial lawyer on the basis of a perceived *group* personality, taking into account *all* eight and not just six of them at random, since in a trial expected to last four to six trial days, it would be unlikely, based on experience, that even one, let alone two, jurors would be excused after the trial had begun.

Commencing a damage phase of a bifurcated trial over a year-and-a-half after conclusion of the liability portion is *not*, it is respectfully urged, within normal trial-time parameters. The jury's subsequently diminished size was due only to the abnormally protracted time between parts of the trial.

This was not bargained for, and, had petitioners' counsel even remotely suspected that the ensuing events would in fact occur, they would have likely made different choices on peremptory challenge. What petitioners got at stage two was,

in context of original group dynamics and personality, *not* the jury they chose, which is tantamount to having been effectively deprived of the right to a jury trial in the first place.

Petitioners' original stipulation regarding jury composition does not detract from this conclusion. Were it otherwise, then that stipulation would have to be given broader interpretation than was reasonable (particularly in view of the circumstances surrounding the stipulation) resulting in forcing petitioners to waive rights (trial by a duly constituted jury) where no such waiver was ever meant. Such result is contrary to the rule of law and reason. See: *Rice v. Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985); 73 AM.JUR. 2d, *Stipulations*, Section 7.

III. IT WAS REVERSIBLE ERROR NOT TO HAVE PERMITTED PETITIONERS TO TESTIFY AS TO THEIR GOOD FAITH DENIAL OF THE EXISTENCE OF A JOINT-VENTURE AND THEIR COMPLETE ABSENCE OF ANY MOTIVE TO CAUSE EMOTIONAL DISTRESS. SUCH ERROR AMOUNTS TO DEPRIVING PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL.

Petitioners sought to introduce evidence regarding the circumstances surrounding their denial of a joint-venture, but, upon objection by the Respondents, the Court refused to permit any testimony in this regard. (RT, July 13, 1988, pages 109-110) The instructions given by the Court were constant with a misconceived notion that relief for emotional distress does not depend in any way upon the nature or character of the causative act or circumstances. Respectfully, it is submitted that the exclusion of such evidence and jury instructions consistent with such exclusion all constitutes reversible error that deprived Petitioners of a fair trial.

Petitioners are unaware of any reported case that has failed to consider, in any question related to emotional distress, the intrinsic nature of the act, the motivation of the perpetrator or the likelihood of infliction of emotional distress

as a foreseeable consequence. And in no place in their briefs before the Ninth Circuit could Respondents offer any contrary view by way of case citation. Indeed, in their attempt to answer Petitioners' arguments regarding emotional distress and the plethora of cases offered in support thereof, cited not *one* single, solitary case from any court from any jurisdiction.

Although requested to do so, the District Court refused to give instructions that would have provided the necessary safeguards for Petitioners against "opening the door to fictitious claims..." See *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 556, 579 (1973); *Crisci v. Security. Co.*, 66 Cal 2d. 425, 434 (1967). Moreover, the one crucial instruction used by the District Court regarding damages for emotional distress (Instruction No. 8) was tantamount to giving the jury a blank check with Respondents names already inserted as payees.

That instruction in effect told the jury that all they had to decide was whether that amount of money ($212,318) that had already been found to have been wrongfully withheld from Respondents by Petitioners was a substantial injury and whether that in turn caused the distress complained of by Respondents.

Obviously, that kind of loss is substantial and would cause distress to anyone, as Respondent Katz so testified it did to him. Since it is impossible to ever disprove this and, since Petitioners had been stripped of their one defense (namely, to show absence of motive and the innocent nature of the act involved), all that remained for the jury to do was to fill in an amount. And that they did, for they had no other choice, in light of those instructions given and those withheld.

There is a fundamental due process concern here, that transcends mere consideration of any particular state law. Emotional distress, like its distant jurisprudential cousin, punitive damages, deals with an essentially subjective gauge or measure of damages.

In neither case (in the absence of statutory regulation) is there any precise, applicable uniform standard that preexists the act giving rise to recovery of damages. In each case, the

law is to a great extent concerned with more than just mere compensation—it is also means to punish the wrongdoer and discourage similar misconduct by anyone else in the future.

Like punitive damages, unless emotional distress recoveries are limited by the intrinsic nature of the act and the motivations of the actor, or, at the very least, to acts that, other considerations aside, are foreseeably and reasonably likely to cause unusual distress, potentially large judgments in this area become like loose cannons. They can blow anyone into debtors prison, so to speak, without giving him a fair opportunity to defend himself.

If all that need to be shown us legal wrong coupled with a financial loss (as was the case here), then even the simplest contract or negligence action can form the basis for an unbeatable emotional distress claim. Constitutional due process safeguards are necessarily applicable here.

CONCLUSION.

The consequences of allowing the trial courts to entertain issues which are at variance with pleadings, pretrial statements and judicial admissions are extremely serious to both the individual litigant and to the judicial system itself. These consequences include probable increases in trial length, expense, and complexity (due to the interjection of new "surprise" issues) and the denial of effective notice to the litigants of the issues which will be adjudicated at trial.

The consequences of improper bifurcation of jury trials are equally grave. Unless trial courts are given more guidance on proper bifurcation procedures, litigants will be forced to try their cases before (understandably) befuddled jurors, and both post-trial motions and appeals will continue to multiply as bifurcated trials grow increasingly common.

By granting this petition and reversing the Court of Appeals, this Court will have the opportunity to both correct the Court of Appeals' misapplication of this Court's *Oscanyan* and *Gasoline Prods. Co.* decisions, and to provide the lower courts with effective guidance on these important due process issues.

Respectfully Submitted,

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NOT FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID KATZ, KATZ-COHN PRODUCTION, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs-Appellees,

v.

BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,

Defendants-Appellants.

Nos. 87-1874, 87-2477

D.C. No. CV-84-5229-WHO

DAVID KATZ, KATZ-COHN PRODUCTION, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs-Appellees,

v.

BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,

Defendants-Appellants.

and

MARTIN COHN,

Defendant.

No. 88-1641

D.C. No. CV-84-5229-WHO

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,
Plaintiffs-Appellees,

v.

MARTIN COHN,
Defendant,

and

BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,
Defendants-Appellants.

No. 88-15626

D.C. No. CV-84-5229-WHO

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,
Plaintiffs-Appellants,

v.

MARTIN COHN,
Defendant,

and

BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,
Defendants-Appellees.

No. 88-15679

D.C. No. CV-84-5229-WHO

MEMORANDUM*

Appeal from the United States District Court for the Northern District of California
William H. Orrick, Jr., District Judge

Argued and Submitted December 11, 1989
San Francisco, California

Before: WRIGHT, HUG, and LEAVY, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

This appeal raises several issues concerning the formation and repudiation of an oral joint venture agreement to manage and produce music of popular artists. The Cohns, who denied the existence of any contract, are Bruce Cohn, Bruce Cohn Management, Inc., and Danjoe Corp. The Katzes asserted the formation of the contract and include David Katz, Katz-Cohn Productions, Inc. and Katz-Cohn Management, Inc. We affirm the district court rulings and judgments on liability and damages.

With regard to the issues within the scope of the joint pretrial statement, one of the disputed factual issues stipulated by the parties was: "[w]hether a joint venture was formed between plaintiffs and defendants and, if so, its terms." We find the 1983 contract formation issues were adequately contained in the joint venture pretrial statement. *See Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985). Because "[a] pretrial order has the effect of amending the pleadings," *Acorn v. City of Phoenix*, 798 F.2d 1260, 1263 (9th Cir. 1986), we need not address whether the complaint failed to include the 1983 contract formation issues.

On the judicial admissions contentions, we apply federal law. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). First, there are no conclusive judicial admissions in the complaint since it was amended by the joint pretrial statement. *See Acorn*, 798 F.2d at 1263; E. Cleary, *McCormick on Evidence* §265, at 783-84 (1984 ed.). Second, we have already found that the 1983 contract formation issues were embraced within the language of the joint pretrial statement. Therefore, there are no conclusive judicial admissions that the contract was formed no later than December, 1982 in the joint pretrial statement. Finally, we conclude there was sufficient evidence presented at trial concerning a February, 1983 contract. Therefore, there were no testimonial judicial admission limiting contract formation to 1982. *Cf. Montgomery v. Moreland*, 205 F.2d 865, 868-69 (9th Cir. 1953).

The Cohns have not demonstrated that the district court was clearly erroneous in finding the Katzes did not make an election of remedies. The district court properly construed California law in concluding that the Katz' remedies were concurrent. *See Gherman v. Colburn*, 72 Cal. App. 3d 544, 564 n.12, 140 Cal. Rptr. 330, 343 n.12 (1977).

The Cohns waived a right to a jury on the division of profits under Fed. R. Civ. P. 49(a). The blanket request for the jury to indicate "the terms of the joint venture contract" was insufficient to raise the particular issue before the trial court. In the absence of a more specific objection—which would have either invited a trial court ruling on this issue or its submission to the jury—the trial court was authorized under Rule 49(a) to make a finding on this and any other omitted issues. Moreover, we conclude that the trial court finding has not been shown to be clearly erroneous under Fed. R. Civ. P. 52(a). *See Queen Ins. Co. of Am. v. Larson*, 225 F.2d 46, 53 (9th Cir. 1955). The trial court properly harmonized the special interrogatory findings within the evidence. *See, e.g., Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108, 119 (1963).

The Cohns also contend that the jury verdict on liability is not supported by substantial evidence and challenge the denial of their motion for directed verdict and JNOV. We affirm these rulings and conclude the jury verdict was supported by substantial evidence. We note further that we are precluded from re-weighing the evidence as some of the Cohns' arguments would have us do. *See, e.g., Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); *William Inglis & Sons Banking Co. v. ITT Continential Baking Co., Inc.*, 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

Because the application of each of the factors under *Asdourian v. Araj*, 38 Cal.3d 276, 292-93, 211 Cal. Rptr. 703, 713-14 (1985), has not been shown to be clearly erroneous,

we affirm the district court's ruling that the contract is enforceable.

The trial court properly submitted the issue of emotional distress damages to the jury. There is no requirement of a finding of bad faith or fraudulent misconduct for emotional distress damages. *See, e.g., Young v. Bank of Am. Nat'l Trust & Sav. Ass'n,* 141 Cal. App. 3d 108, 114, 190 Cal. Rptr. 122, 126 (1983) (citations omitted) (cited in *Gilchrist v. Jim Slemons Imports, Inc.,* 803 F.2d 1488, 1499 (9th Cir. 1986)). *See also Pintor v. Ong,* 211 Cal. App. 3d 837, 259 Cal. Rptr. 577, 581-82 (1989) (following *Young*); *Stephens v. Coldwell Banker Commercial Group, Inc.,* 199 Cal. App. 3d 1394, 1402-03; 245 Cal. Rptr. 606, 611 (1988) (same). In the liability phase of the trial, the jury found that the Cohns had breached their fiduciary duty under the joint venture agreement. In the damage stage, the trial judge instructed the jury on the general measure of tort damages pursuant to Cal. Civil Code 3333 (West 1970).[1] The jury was also instructed that a "breach of fiduciary duty is an intentional act under the law." Under California law, emotional distress damages may be awarded for intentional wrongdoing. *See, e.g., Jahn v. Brickey,* 168 Cal. App. 3d 399, 407, 214 Cal. Rptr. 119, 124 (1985); *Quezada v. Hart,* 67 Cal. App. 3d 754, 761, 136 Cal. Rptr. 815, 819 (1977). Sufficient evidence was submitted on which the jury could find that the breach of fiduciary duty proximately caused emotional distress damages to David Katz and that the injuries were severe within the meaning of California law.

The trial judge properly instructed the jury on each element of the case. *See, e.g., Bulgo v. Munoz,* 853 F.2d 710, 714 (9th Cir. 1988).

The district court did not abuse its discretion in the damages phase of the trial in excluding testimonial evidence

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[1] This provision provides, in pertinent part:

> For the breach of an obligation not arising from contract, the measure of damages. . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

that Bruce Cohn held a good faith and reasonable belief that he owed no fiduciary duty. *Roberts v. College of the Desert*, 870 F. 2d 1411, 1418 (9th Cir. 1988).

The Cohns have provided no valid basis to challenge the jury's discretion on the size of its award of emotional distress damages. *See, e.g., Young*, 141 Cal. App. 3d at 115, 190 Cal. Rptr. at 127.

The size of the six-member jury panel for the damages phase of the trial was within the open-court stipulation on jury size, pursuant to Fed. R. Civ. P. 48. Counsel expressly stipulated to the possibility of a six-person jury in the event of "los[ing]" up to two jurors. *See Marbury-Pattillo Constr. Co., Inc. v. Bayside Warehouse Co.*, 490 F.2d 155, 160 (5th Cir. 1974). *Accord Fletcher v. McCreary Tire & Rubber Co.*, 773 F.2d 666, 669 & n.4 (5th Cir. 1985); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 514-15 (4th Cir. 1985).

We find the other contentions of the Cohns' unpersuasive. We do not reverse the judgment or remand for a new trial. Thus, because the Katzes indicated that they would withdraw their cross-appeal on the dismissal of their punitive damages claim, we do not consider the cross-appeal.

AFFIRMED.

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID KATZ, KATZ-COHN PRODUCTION, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs-Appellees,

v.

BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,

Defendants-Appellants.

Nos. 87-1874, 87-2477

D.C. No. CV-84-5229-WHO

DAVID KATZ, KATZ-COHN PRODUCTION, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs-Appellees,

v.

BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,

Defendants-Appellants.

and

MARTIN COHN,

Defendant.

No. 88-1641

D.C. No. CV-84-5229-WHO

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,
Plaintiffs-Appellees,
v.
MARTIN COHN,
Defendant,
and
BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,
Defendants-Appellants.

No. 88-15626
D.C. No. CV-84-5229-WHO

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation; KATZ-COHN MANAGEMENT, INC., an Arizona corporation,
Plaintiffs-Appellants,
v.
MARTIN COHN,
Defendant,
and
BRUCE COHN; BRUCE COHN MANAGEMENT, INC., a California corporation; DANJOE CORPORATION, a corporation,
Defendants-Appellees.

No. 88-15679
D.C. No. CV-84-5229-WHO

Appeal from the United States District Court for the Northern District of California

Before: WRIGHT, HUG, and LEAVY, Circuit Judges.

Upon due consideration, the panel in the above-entitled case has voted unanimously to deny the petition for rehearing filed by appellants on May 1, 1990.

The petition for rehearing is hereby DENIED.

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

MEMORANDUM OPINION AND ORDER

This case came before the Court for jury trial on January 5, 1987. The Court ruled that the case would be bifurcated, the liability issues tried initially with a later trial on the damages to the extent that was necessary. On January 12, 1987 the jury returned with a special verdict, finding as follows with respect to the liability issues:

1. Was a contract creating a joint venture entered into between plaintiffs and defendants?

__x__ Yes ____ No

* * * * *

2. On what date do you find the joint venture contract to have been entered into?

Date: Feb. 4 '83

3. Did the letter of December 22, 1982, known as plaintiffs' Exhibit No. 4, contain the terms of the joint venture agreement entered into between plaintiffs and defendants?

____ Yes __x__ No

4. Did the defendants terminate the joint venture after it was formed?

____ Yes __x__ No

* * * * *

5. On what dated did the defendant terminate the joint venture?

Dated: _____

6. Did defendants breach their fiduciary obligation to plaintiffs as a joint venturer?

__x__ Yes ____ No

* * * * *

7. On what date did the defendants breach their fiduciary obligation to plaintiffs?

Date: Aug. 19, 1983

On January 22, 1987, defendants filed motions for judgment, directed verdict, judgment notwithstanding the verdict and, in the alternative, for new trial. Plaintiffs simultaneously filed a motion for an accounting, and requested the recall of the jury to determine the remaining damages in the case. The Court, having heard oral argument, having considered all the briefs, declarations, and memoranda on file, and good cause appearing therefor, denies defendants' motions in their entirety for the reasons that follow, and awards plaintiffs the right to an accounting.

I

Upon the completion of a three-day trial, the jury deliberated for two-and-one-half days before returning a special verdict. The verdict of the jury established that: (1) there was a joint venture agreement entered into between plaintiffs and defendants; (2) the agreement was entered into on February 4, 1983; (3) the letter of December 22, 1983, either did not contain all the terms of the agreement, or did not contain any of the terms of the agreement; (4) defendants did not terminate the agreement after it was entered into, or at least

did not terminate the agreement prior to the defendants' breach of their fiduciary duty; and (5) defendants' breached their fiduciary duty to plaintiffs as co-joint venture members on August 19, 1983.

A

Initially, defendants argue that this verdict is fatally inconsistent with the evidence presented at trial, and move the Court for either a judgment for defendants based on the evidence, or a grant of a new trial. The Court disagrees with defendants' assertion that the verdict is fatally inconsistent with the evidence presented at trial. As the Supreme Court has often stated: "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case that will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 365 (1962).

There is clearly sufficient evidence for the jury to have concluded that the parties came to an agreement to form a joint venture on February 4, 1984, and that the letter of December 22, 1983, contained some of the terms of the agreement. There was overwhelming evidence at trial that the December 22 letter contained the initial understanding of the parties as to what their "proposed agreement" would be, and that at the meeting of February 4 the parties discussed and altered certain of the terms of the joint venture before reaching agreement. The jury must have found from the evidence that the parties did not reach an agreement until the February 4 meeting, and that at the meeting the parties altered certain terms of the December 22 letter such as to render much of that letter invalid. However, the jury must have also found that the December 22 letter did include certain terms of the final agreement because the evidence was uncontradicted that the February 4 meeting did not alter certain sections of the December 22 letter, such as the pro-

posal that plaintiffs would initially bear 60 percent of the overhead of the joint venture.

Additionally, the evidence presented at trial consistently showed that, assuming there was an actual agreement at the February 4 meeting, the parties agreed to certain terms for the joint venture: (1) plaintiffs agreed to reduce their percentage of the earnings from defendants' contract with the music group Night Ranger from 33⅓ percent to 25 percent for the life of the joint venture; (2) plaintiffs agreed to assume 60 percent of the overhead of the joint venture for the life of the joint venture, with future alteration of that percentage upon mutual agreement if conditions changed; and (3) upon dissolution or termination of the joint venture, plaintiffs would be entitled to a 12½ percent share of the earnings from the contract with the music group Night Ranger for the life of the contract. After termination, there would, of course, be no deductions for expenses because the joint venture would no longer exist to incur expenses.

There was also sufficient evidence presented at trial to support the jury's findings that defendants breached their fiduciary duty to plaintiffs under the joint venture on August 19, 1984. The only evidence presented at trial showed that on August 19, plaintiffs sent a letter to defendants requesting an accounting of the proceeds of the Night Ranger group under the contract between Night Ranger and defendants. Defendants' failure to respond to this letter, or to acknowledge plaintiffs' request, constituted the breach by defendants found by the jury.

Finally, while there was clear and sufficient evidence for the jury to find that defendants did not terminate the joint venture prior to the breach of their duty towards plaintiffs, the evidence was uncontradicted that the joint venture was indeed terminated by the parties at least as of May 1, 1984. During the trial, in response to questioning by the Court, both parties agreed on the record that the joint venture was terminated as between the parties by at least May 1, 1984, and that thereafter the parties ceased to be involved in the joint venture together. The evidence was without conflict

that by May 1, 1984, the joint venture no longer existed between these two parties; the jury's finding on termination becomes clear only after one realizes that the parties' admission concerning the May 1 date occurred outside the presence of the jury. Therefore, in light of the evidence presented and the jury's verdict, the Court finds that the jury found that defendants did not terminate the joint venture prior to May 1, 1984, but that as of May 1, the joint venture was indeed terminated as between plaintiffs and defendants.

In light of the guidance offered by the Supreme Court in *Atlantic & Gulf Stevedores,* concerning special verdicts, the Court finds that the evidence presented at trial amply supports the findings of the jury verdict. The findings of the jury are reasonable and logical when read in light of the "view of the case" expressed by this Court in the immediately preceding discussion. Accordingly, the Court must deny defendants' motion for a judgment on the evidence and for a new trial.

B

Defendants next bring motions for a directed verdict and a judgment notwithstanding the verdict ("JNOV"). A motion for JNOV, like a motion for directed verdict, must state the grounds on which it is made. Because technically a motion for JNOV is really only a renewal of the motion for directed verdict, a motion for JNOV cannot assert a ground that was not included in the motion for directed verdict. The standard for granting a JNOV is precisely the same as the standard for directing a verdict, and the JNOV should be granted only if the motion for directed verdict should have been granted. *Juhnke v. EIG Corp.*, 444 F.2d 1323 (9th Cir. 1971); 9 C. Wright & A. Miller, Federal Practice and Procedure, section 2537, at 598-99 (2d ed. 1983). The standard for both motions is whether "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Walker v. KFC Corp.*, 728 F.2d 1215, 1223 (9th Cir. 1984); 9 C. Wright & A. Miller, *supra,* Section 2524, at 545-46.

The Court took defendants' earlier motion for directed verdict during the trial under advisement and, therefore, will now consider both motions as one in this instance. The gravamen of these motions is not that the evidence is insufficient, rather it is that the joint venture agreement is void and unenforceable because it is in violation of Section 1700.30 of the California Labor Code. Defendants assert that because the alleged agreement was not presented for approval before the state Labor Commission, the agreement is illegal and this Court is prevented from enforcing it. The Court disagrees with defendants' application of the statute in this instance, and defendants' use of the older cases cited in their papers for the proposition that a court may never enforce an arguably illegal contract. The Court relies instead on the recent California Supreme Court case of *Asdourian v. Araj*, 38 Cal.3d 276, 695 P.2d 665 (1985).

In *Asdourian*, the Supreme court recognized the general rule that a "contract made in violation of a regulatory statute is void. Normally, courts will not 'lend their aid to the enforcement of an illegal agreement or one against public policy ....'" *Id.* at 291 (citations omitted). However, the Court held that the rule against enforcement of illegal contracts " 'is not an inflexible one to be applied in its fullest rigor under any and all circumstances. A wide range of exceptions has been recognized.' " *Id.* at 291, citing *Southfield v. Barrett*, 13 Cal.App.3d 290, 294, 91 Cal.Rptr. 514, 516 (1970). Indeed, one exception to the general rule, the doctrine of substantial compliance with respect to contracts entered into by unlicensed contractors, has been in effect for "almost five decades." *Id.* at 287.

The *Asdourian* court found that there were compelling reasons to enforce the contract at issue, despite the fact that the contract was in violation of *two* statutes, one being the statute against unlicensed contractors entering into contracts. In upholding the contract, and finding it enforceable, the Court noted four convincing factors: (1) the contract was not illegal *per se*; (2) the public policies underlying the violated statutes were not themselves contravened by the "illegal" acts; (3) the defendant, who sought to have the contract

declared unenforceable, was not an unsophisticated member of the public; and (4) the defendant would be unjustly enriched if the contract were voided and not enforced. The infringed statutes in *Asdourian* were intended to protect a possibly unsuspecting and vulnerable public, and provided that a violation constituted a misdemeanor punishable by fine and/or short term of imprisonment.

Applying the *Asdourian* reasoning to the case at hand, the Court finds that the facts compel the conclusion that the joint venture agreement is enforceable despite the fact that it is technically in violation of Section 1700.30 of the California Labor Code. Initially, the statute involved here is similar in spirit to that in *Asdourian;* Section 1700.30 of the California Labor Code was intended to protect possibly unsuspecting and vulnerable musicians from unscrupulous managers, and also provides that a violation is a misdemeanor punishable by analogous terms. Further, upon an examination of the facts, the Court finds that: (1) the contract for the joint venture was not illegal *per se,* or designed to achieve an illegal or inherently inequitable purpose; (2) the public policies underlying the statute of protecting artists and musicians from unscrupulous managers and agents were not violated by the agreement; (3) defendant Bruce Cohn was not unsophisticated or likely to be unfairly disadvantaged by the agreement and, in fact, Cohn is by his own admission a highly successful and expert manager, far more experienced than plaintiffs in this particular field; and (4) defendants would be unjustly enriched and plaintiffs would suffer an unduly harsh remedy if the agreement were voided on such hypertechnical grounds as those advanced by defendants.

As to this last point, the *Asdourian* Court noted that in the context of the case before it, "[t]o allow defendant to prevail on a technicality would be to allow [the statute] to be used as a "shield for the avoidance of a just obligation.'" *Asdourian,* 38 Cal.3d at 289, citing *Latipac, Inc. v. Superior Court of Marin County,* 64 Cal.2d 278, 411 P.2d 564 (1966). Defendants attempt to avail themselves of just such a shield here, and this Court finds such arguments wholly unconvincing. In light of all the above facts, and guided by the reasoning

of the *Asdourian* decision, the Court finds that the joint venture agreement should be enforced despite its technical violation of Section 1700.30 of the California Labor Code and, therefore, denies defendants' motions for directed verdict and JNOV.

II

Plaintiffs seek a variety of remedies in this action: consequential damages; damages for emotional distress; and an accounting of the proceeds of the Night Ranger contract, and payment of plaintiffs' share of those proceeds at regular intervals. Defendants respond to plaintiffs' remedial requests by arguing that plaintiffs have "elected" to pursue a remedy of damages at law, have abandoned their pursuit of an accounting, are bound by their election and, thus, are barred from seeking a judicial accounting or an appropriate order. Defendants are in error. Plaintiffs have never abandoned their pursuit of a judicial accounting, and further are not prevented by law from seeking damages and an accounting simultaneously.

A

Both parties correctly cite the case of *Gherman v. Colburn*, 72 Cal.App.3d 544, 140 Cal.Rptr. 330 (1977), as the definitive ruling on the issue, but offer differing interpretations of its holding. Plaintiffs also direct the Court's attention to Sections 15038, 15042, and 15043 of the California Corporations Code. Plaintiffs are correct in arguing that under Section 25038 and the *Gherman* case, a partner in a joint venture who has been wrongfully excluded from the venture may pursue damages at law, an accounting in equity, or *both*. It is well settled that a forced election of remedies is disfavored in California. 3 B. Witkin, California Procedure, Actions, Sections 132, 138 (3d ed. 1985).

The court in *Gherman* was faced with a case similar to that before this Court, and found that the remedies of dam-

ages and an accounting were "cumulative," not exclusive. The plaintiff in *Gherman* sued for wrongful exclusion from a joint venture, and the losing defendant argued that plaintiff was limited in his remedies. The plaintiff had in fact abandoned the equitable remedy of accounting, and chose instead to pursue an action at law for damages. The defendant asserted that an accounting was the exclusive remedy, and plaintiff was thus entitled to no recovery. The *Gherman* court explained that California case law, and Section 15038 of the California Corporations Code, recognize that a wrongfully excluded partner in a joint venture or a partnership has the right to pursue either damages or an accounting, though, of course, there may be only one recovery on the actual damages sustained.

For further support, the court in *Gherman* pointed to the opinion of the United States Supreme Court that, in a similar situation, "the remedy [of judicial dissolution and an accounting] in equity for a breach of a partnership agreement [is not] exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution." *Gherman*, 72 Cal. App.3d at 562, 140 Cal.Rptr. at 341, citing *Zimmerman v. Harding*, 227 U.S. 489, 494 (1913). In no uncertain terms, the *Gherman* court went on to state that "under Corporation Code section 15038 [the remedies of damages and an accounting] are actually *cumulative* remedies [even though] in our case plaintiffs waived their right to an accounting." *Gherman*, 72 Cal.App.3d at 564 n.12, 140 Cal.Rptr. at 343 n.12 (emphasis added).

In this case, plaintiffs have repeatedly stated that they are pursuing *both* damages at law and an accounting in equity for the profits of the joint venture. Plaintiffs must, therefore, be allowed to seek both types of damages, cognizant that they, of course, may only recover once for injury sustained.

B

Though the Court has some questions concerning plaintiffs' claim for damages as a result of the sale of the house, primarily because it was put up for sale long before the joint venture was formed and the only offer ever tendered was

accepted, the Court will not rule at present on this aspect of plaintiffs' case nor on plaintiffs' claims of damages as a result of emotional distress. However, because an accounting is a remedy in equity and the evidence supports only one interpretation, the Court will rule on plaintiffs' claim for an accounting.

As the Court has already stated in its discussion of the jury verdict and the evidence presented at trial, there is only one reasonable determination of the verdict and the specifics of the ruling for plaintiffs. The jury found that the parties entered into a joint venture on February 4, 1984, and that the agreement's terms were as follows: (1) during the life of the joint venture, plaintiffs were entitled to 25 percent of the proceeds defendants received from their contract with the Night Ranger group, minus 60 percent of the overhead incurred by the joint venture; (2) upon termination or the end of the joint venture agreement, plaintiffs were entitled to 12½ percent of the proceeds defendants received from their contract with Night Ranger, with no deduction for overhead incurred by the joint venture because none could now exist; and (3) the defendants did not terminate the joint venture prior to their breach of their fiduciary duty to plaintiffs, but the joint venture agreement was terminated or ended at least by May 1, 1984.

Therefore, plaintiffs are entitled to recover from defendants pursuant to a remedy of accounting the amount of the Night Ranger contract's proceeds consistent with the verdict as explained by the Court above. Plaintiffs are also entitled to an accounting from defendants, at periodic intervals, of the proceeds under the Night Ranger contract, with proper documentation if necessary, and to the immediate payment from defendants of plaintiffs' past share of the contract's proceeds pursuant to this Memorandum and Order of the Court. Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motions for judgment on the evidence, the directed verdict, judgment notwithstanding verdict and,

in the alternative, for new trial, are denied for the reasons stated above.

2. Plaintiff's motion for an award of the remedy of accounting is granted. Under the verdict rendered by the jury on January 12, 1987, and pursuant to the evidence presented at trial, plaintiffs are entitled to recover from defendants:

(a) Twenty-five percent of the proceeds received by defendants from their Night Ranger contract for the period from February 4, 1984 to May 1, 1984, minus 60 percent of the overhead incurred by the joint venture for the same period.

(b) Thereafter, plaintiffs are entitled to recover 12½ percent of the proceeds received by defendants from their Night Ranger contract for the life of that contract, with no deduction for overhead.

3. Defendants will immediately pay to plaintiffs their rightful share, pursuant to the above allocation under the verdict rendered, of the proceeds already received by defendants under the Night Ranger contract.

4. Defendants will pay to plaintiffs their rightful share, pursuant to the above allocation under the verdict rendered, of the proceeds received by the defendants in the future under the Night Ranger contract, at regular intervals and with the necessary documentation, in a manner that is mutually agreeable to the parties.

5. The parties will submit to the Court on or before April 2, 1987, memoranda outlining the necessary steps and procedures that remain to be completed in this case, and whether the jury is required to be recalled for any further deliberations.

Dated: March 19, 1987.

William H. Orrick
United States District Judge

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

AMENDED MEMORANDUM OPINION AND ORDER

This case came before the Court for jury trial on January 5, 1987. The Court ruled that the case would be bifurcated, the liability issues tried initially with a later trial on the damages to the extent that was necessary. On January 12, 1987 the jury returned with a special verdict, finding as follows with respect to the liability issues:

1. Was a contract creating a joint venture entered into between plaintiffs and defendants?

_x_ Yes ____ No

* * * * *

2. On what date do you find the joint venture contract to have been entered into?

Date: Feb. 4 '83

3. Did the letter of December 22, 1982, known as plaintiffs' Exhibit No. 4, contain the terms of the joint venture agreement entered into between plaintiffs and defendants?

____ Yes _x_ No

4. Did the defendants terminate the joint venture after it was formed?

____ Yes __x__ No

* * * * *

5. On what dated did the defendant terminate the joint venture?

Dated: _____

6. Did defendants breach their fiduciary obligation to plaintiffs as a joint venturer?

__x__ Yes ____ No

* * * * *

7. On what date did the defendants breach their fiduciary obligation to plaintiffs?

Date: Aug. 19, 1983

On January 22, 1987, defendants filed motions for judgment, directed verdict, judgment notwithstanding the verdict and, in the alternative, for new trial. Plaintiffs simultaneously filed a motion for an accounting, and requested the recall of the jury to determine the remaining damages in the case. The Court, having heard oral argument, having considered all the briefs, declarations, and memoranda on file, and good cause appearing therefor, denies defendants' motions in their entirety for the reasons that follow, and awards plaintiffs the right to an accounting.

I

Upon the completion of a three-day trial, the jury deliberated for two-and-one-half days before returning a special verdict. The verdict of the jury established that: (1) there was a joint venture agreement entered into between plaintiffs and defendants; (2) the agreement was entered into on February 4, 1983; (3) the letter of December 22, 1982, either did not contain all the terms of the agreement, or did not contain any of the terms of the agreement; (4) defendants did not terminate the agreement after it was entered into, or at least

did not terminate the agreement prior to the defendants' breach of their fiduciary duty; and (5) defendants' breached their fiduciary duty to plaintiffs as co-joint venture members on August 19, 1983.

A

Initially, defendants argue that this verdict is fatally inconsistent with the evidence presented at trial, and move the Court for either a judgment for defendants based on the evidence, or a grant of a new trial. The Court disagrees with defendants' assertion that the verdict is fatally inconsistent with the evidence presented at trial. As the Supreme Court has often stated: "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case that will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 365 (1962).

There is clearly sufficient evidence for the jury to have concluded that the parties came to an agreement to form a joint venture on February 4, 1983, and that the letter of December 22, 1982, contained some of the terms of the agreement. There was overwhelming evidence at trial that the December 22 letter contained the initial understanding of the parties as to what their "proposed agreement" would be, and that at the meeting of February 4 the parties discussed and altered certain of the terms of the joint venture before reaching agreement. The jury must have found from the evidence that the parties did not reach an agreement until the February 4 meeting, and that at the meeting the parties altered certain terms of the December 22 letter such as to render much of that letter invalid. However, the jury must have also found that the December 22 letter did include certain terms of the final agreement because the evidence was uncontradicted that the February 4 meeting did not alter certain sections of the December 22 letter, such as the pro-

posal that plaintiffs would initially bear 60 percent of the overhead of the joint venture.

Additionally, the evidence presented at trial consistently showed that, assuming there was an actual agreement at the February 4 meeting, the parties agreed to certain terms for the joint venture: (1) plaintiffs agreed to reduce their percentage of the earnings from defendants' contract with the music group Night Ranger from 33⅓ percent to 25 percent for the life of the joint venture; (2) plaintiffs agreed to assume 60 percent of the overhead of the joint venture for the life of the joint venture, with future alteration of that percentage upon mutual agreement if conditions changed; and (3) upon dissolution or termination of the joint venture, plaintiffs would be entitled to a 12½ percent share of the earnings from the contract with the music group Night Ranger for the life of the contract. After termination, there would, of course, be no deductions for expenses because the joint venture would no longer exist to incur expenses.

There was also sufficient evidence presented at trial to support the jury's findings that defendants breached their fiduciary duty to plaintiffs under the joint venture on August 19, 1983. The only evidence presented at trial showed that on August 19, plaintiffs sent a letter to defendants requesting an accounting of the proceeds of the Night Ranger group under the contract between Night Ranger and defendants. Defendants' failure to respond to this letter, or to acknowledge plaintiffs' request, constituted the breach by defendants found by the jury.

Finally, while there was clear and sufficient evidence for the jury to find that defendants did not terminate the joint venture prior to the breach of their duty towards plaintiffs, the evidence was uncontradicted that the joint venture was indeed terminated by the parties at least as of May 1, 1983. During the trial, in response to questioning by the Court, both parties agreed on the record that the joint venture was terminated as between the parties by at least May 1, 1983, and that thereafter the parties ceased to be involved in the joint venture together. The evidence was without conflict

that by May 1, 1983, the joint venture no longer existed between these two parties; the jury's finding on termination becomes clear only after one realizes that the parties' admission concerning the May 1 date occurred outside the presence of the jury. Therefore, in light of the evidence presented and the jury's verdict, the Court finds that the jury found that defendants did not terminate the joint venture prior to May 1, 1983, but that as of May 1, the joint venture was indeed terminated as between plaintiffs and defendants.

In light of the guidance offered by the Supreme Court in *Atlantic & Gulf Stevedores*, concerning special verdicts, the Court finds that the evidence presented at trial amply supports the findings of the jury verdict. The findings of the jury are reasonable and logical when read in light of the "view of the case" expressed by this Court in the immediately preceding discussion. Accordingly, the Court must deny defendants' motion for a judgment on the evidence and for a new trial.

Defendants next bring motions for a directed verdict and a judgment notwithstanding the verdict ("JNOV"). A motion for JNOV, like a motion for directed verdict, must state the grounds on which it is made. Because technically a motion for JNOV is really only a renewal of the motion for directed verdict, a motion for JNOV cannot assert a ground that was not included in the motion for directed verdict. The standard for granting a JNOV is precisely the same as the standard for directing a verdict, and the JNOV should be granted only if the motion for directed verdict should have been granted. *Juhnke v. EIG Corp.*, 444 F.2d 1323 (9th Cir. 1971); 9 C. Wright & A. Miller, Federal Practice and Procedure, section 2537, at 598-99 (2d ed. 1983). The standard for both motions is whether "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Walker v. KFC Corp.*, 728 F.2d 1215, 1223 (9th Cir. 1984); 9 C. Wright & A. Miller, *supra*, Section 2524, at 54546.

The Court took defendants' earlier motion for directed verdict during the trial under advisement and, therefore, will

now consider both motions as one in this instance. The gravamen of these motions is not that the evidence is insufficient, rather it is that the joint venture agreement is void and unenforceable because it is in violation of Section 1700.30 of the California Labor Code. Defendants assert that because the alleged agreement was not presented for approval before the state Labor Commission, the agreement is illegal and this Court is prevented from enforcing it. The Court disagrees with defendants' application of the statute in this instance, and defendants' use of the older cases cited in their papers for the proposition that a court may never enforce an arguably illegal contract. The Court relies instead on the recent California Supreme Court case of *Asdourian v. Araj*, 38 Cal.3d 276, 695 P.2d 665 (1985).

In *Asdourian*, the Supreme court recognized the general rule that a "contract made in violation of a regulatory statute is void. Normally, courts will not 'lend their aid to the enforcement of an illegal agreement or one against public policy. . . .' " *Id.* at 291 (citations omitted). However, the Court held that the rule against enforcement of illegal contracts " 'is not an inflexible one to be applied in its fullest rigor under any and all circumstances. A wide range of exceptions has been recognized.' " *Id.* at 291, citing *Southfield v. Barrett*, 13 Cal.App.3d 290, 294, 91 Cal.Rptr. 514, 516 (1970). Indeed, one exception to the general rule, the doctrine of substantial compliance with respect to contracts entered into by unlicensed contractors, has been in effect for "almost five decades." *Id.* at 287.

The *Asdourian* court found that there were compelling reasons to enforce the contract at issue, despite the fact that the contract was in violation of *two* statutes, one being the statute against unlicensed contractors entering into contracts. In upholding the contract, and finding it enforceable, the Court noted four convincing factors: (1) the contract was not illegal *per se;* (2) the public policies underlying the violated statutes were not themselves contravened by the "illegal" acts; (3) the defendant, who sought to have the contract declared unenforceable, was not an unsophisticated member of the public; and (4) the defendant would be unjustly en-

riched if the contract were voided and not enforced. The infringed statutes in *Asdourian* were intended to protect a possibly unsuspecting and vulnerable public, and provided that a violation constituted a misdemeanor punishable by fine and/or short term of imprisonment.

Applying the *Asdourian* reasoning to the case at hand, the Court finds that the facts compel the conclusion that the joint venture agreement is enforceable despite the fact that it is technically in violation of Section 1700.30 of the California Labor Code. Initially, the statute involved here is similar in spirit to that in *Asdourian;* Section 1700.30 of the California Labor Code was intended to protect possibly unsuspecting and vulnerable musicians from unscrupulous managers, and also provides that a violation is a misdemeanor punishable by analogous terms. Further, upon an examination of the facts, the Court finds that: (1) the contract for the joint venture was not illegal *per se,* or designed to achieve an illegal or inherently inequitable purpose; (2) the public policies underlying the statute of protecting artists and musicians from unscrupulous managers and agents were not violated by the agreement; (3) defendant Bruce Cohn was not unsophisticated or likely to be unfairly disadvantaged by the agreement and, in fact, Cohn is by his own admission a highly successful and expert manager, far more experienced than plaintiffs in this particular field; and (4) defendants would be unjustly enriched and plaintiffs would suffer an unduly harsh remedy if the agreement were voided on such hypertechnical grounds as those advanced by defendants.

As to this last point, the *Asdourian* Court noted that in the context of the case before it, "[t]o allow defendant to prevail on a technicality would be to allow [the statute] to be used as a 'shield for the avoidance of a just obligation.'" *Asdourian,* 38 Cal.3d at 289, citing *Latipac, Inc. v. Superior Court of Marin County,* 64 Cal.2d 278, 411 P.2d 564 (1966). Defendants attempt to avail themselves of just such a shield here, and this Court finds such arguments wholly unconvincing. In light of all the above facts, and guided by the reasoning of the *Asdourian* decision, the Court finds that the joint venture agreement should be enforced despite its technical

violation of Section 1700.30 of the California Labor Code and, therefore, denies defendants' motions for directed verdict and JNOV.

II

Plaintiffs seek a variety of remedies in this action: consequential damages; damages for emotional distress; and an accounting of the proceeds of the Night Ranger contract, and payment of plaintiffs' share of those proceeds at regular intervals. Defendants respond to plaintiffs' remedial requests by arguing that plaintiffs have "elected" to pursue a remedy of damages at law, have abandoned their pursuit of an accounting, are bound by their election and, thus, are barred from seeking a judicial accounting or an appropriate order. Defendants are in error. Plaintiffs have never abandoned their pursuit of a judicial accounting, and further are not prevented by law from seeking damages and an accounting simultaneously.

A

Both parties correctly cite the case of *Gherman v. Colburn*, 72 Cal.App.3d 544, 140 Cal.Rptr. 330 (1977), as the definitive ruling on the issue, but offer differing interpretations of its holding. Plaintiffs also direct the Court's attention to Sections 15038, 15042, and 15043 of the California Corporations Code. Plaintiffs are correct in arguing that under Section 25038 and the *Gherman* case, a partner in a joint venture who has been wrongfully excluded from the venture may pursue damages at law, an accounting in equity, or *both*. It is well settled that a forced election of remedies is disfavored in California. 3 B. Witkin, California Procedure, Actions, Sections 132, 138 (3d ed. 1985).

The court in *Gherman* was faced with a case similar to that before this Court, and found that the remedies of damages and an accounting were "cumulative," not exclusive. The plaintiff in *Gherman* sued for wrongful exclusion from a

joint venture, and the losing defendant argued that plaintiff was limited in his remedies. The plaintiff had in fact abandoned the equitable remedy of accounting, and chose instead to pursue an action at law for damages. The defendant asserted that an accounting was the exclusive remedy, and plaintiff was thus entitled to no recovery. The *Gherman* court explained that California case law, and Section 15038 of the California Corporations Code, recognize that a wrongfully excluded partner in a joint venture or a partnership has the right to pursue either damages or an accounting, though, of course, there may be only one recovery on the actual damages sustained.

For further support, the court in *Gherman* pointed to the opinion of the United States Supreme Court that, in a similar situation, "the remedy [of judicial dissolution and an accounting] in equity for a breach of a partnership agreement [is not] exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution." *Gherman*, 72 Cal. App.3d at 562, 140 Cal.Rptr. at 341, citing *Zimmerman v. Harding*, 227 U.S. 489, 494 (1913). In no uncertain terms, the *Gherman* court went on to state that "under Corporation Code section 15038 [the remedies of damages and an accounting] are actually *cumulative* remedies [even though] in our case plaintiffs waived their right to an accounting." *Gherman*, 72 Cal.App.3d at 564 n.12, 140 Cal.Rptr. at 343 n.12 (emphasis added).

In this case, plaintiffs have repeatedly stated that they are pursuing *both* damages at law and an accounting in equity for the profits of the joint venture. Plaintiffs must, therefore, be allowed to seek both types of damages, cognizant that they, of course, may only recover once for injury sustained.

B

Though the Court has some questions concerning plaintiffs' claim for damages as a result of the sale of the house, primarily because it was put up for sale long before the joint venture was formed and the only offer ever tendered was

accepted, the Court will not rule at present on this aspect of plaintiffs' case nor on plaintiffs' claims of damages as a result of emotional distress. However, because an accounting is a remedy in equity and the evidence supports only one interpretation, the Court will rule on plaintiffs' claim for an accounting.

As the Court has already stated in its discussion of the jury verdict and the evidence presented at trial, there is only one reasonable determination of the verdict and the specifics of the ruling for plaintiffs. The jury found that the parties entered into a joint venture on February 4, 1983, and that the agreement's terms were as follows: (1) during the life of the joint venture, plaintiffs were entitled to 25 percent of the proceeds defendants received from their contract with the Night Ranger group, minus 60 percent of the overhead incurred by the joint venture; (2) upon termination or the end of the joint venture agreement, plaintiffs were entitled to 12½ percent of the proceeds defendants received from their contract with Night Ranger, with no deduction for overhead incurred by the joint venture because none could now exist; and (3) the defendants did not terminate the joint venture prior to their breach of their fiduciary duty to plaintiffs, but the joint venture agreement was terminated or ended at least by May 1, 1983.

Therefore, plaintiffs are entitled to recover from defendants pursuant to a remedy of accounting the amount of the Night Ranger contract's proceeds consistent with the verdict as explained by the Court above. Plaintiffs are also entitled to an accounting from defendants, at periodic intervals, of the proceeds under the Night Ranger contract, with proper documentation if necessary, and to the immediate payment from defendants of plaintiffs' past share of the contract's proceeds pursuant to this Memorandum and Order of the Court. Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motions for judgment on the evidence, the directed verdict, judgment notwithstanding verdict and,

in the alternative, for new trial, are denied for the reasons stated above.

2. Plaintiff's motion for an award of the remedy of accounting is granted. Under the verdict rendered by the jury on January 12, 1987, and pursuant to the evidence presented at trial, plaintiffs are entitled to recover from defendants:

(a) Twenty-five percent of the proceeds received by defendants from their Night Ranger contract for the period from February 4, 1983 to May 1, 1983, minus 60 percent of the overhead incurred by the joint venture for the same period.

(b) Thereafter, plaintiffs are entitled to recover 12½ percent of the proceeds received by defendants from their Night Ranger contract for the life of that contract, with no deduction for overhead.

3. Defendants will immediately pay to plaintiffs their rightful share, pursuant to the above allocation under the verdict rendered, of the proceeds already received by defendants under the Night Ranger contract.

4. Defendants will pay to plaintiffs their rightful share, pursuant to the above allocation under the verdict rendered, of the proceeds received by the defendants in the future under the Night Ranger contract, at regular intervals and with the necessary documentation, in a manner that is mutually agreeable to the parties.

5. The parties will submit to the Court on or before April 2, 1987, memoranda outlining the necessary steps and procedures that remain to be completed in this case, and whether the jury is required to be recalled for any further deliberations.

Dated: March 31, 1987.

William H. Orrick
United States District Judge

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

ORDER APPOINTING SPECIAL MASTER

Good cause appearing therefor,

IT IS HEREBY ORDERED that John P. Austin, Esquire, is appointed Special Master in the above-entitled case. His duties shall include, among other things, making an investigation of all matters raised by the pleadings in this case, and making such reports and recommendations to the Court with respect to such matters deemed by him to be helpful in settling the case.

IT IS FURTHER ORDERED that the Special Master shall receive as compensation for his services his normal hourly rate times the number of hours he spends performing the above-described duties. His compensation will be paid one-half by the plaintiff and one-half by the defendants.

Dated: July 2, 1987

William H. Orrick
United States District Judge

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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

SUPPLEMENTAL ORDER
(By Stipulation)

AND RELATED COUNTERCLAIM

The parties have stipulated that the court may make the following order to supplement and reinforce the court's Memorandum Opinion and Order dated March 20, 1987, as amended by the court's Amended Memorandum Opinion and Order dated March 31, 1987.

IT IS ORDERED THAT:

1. The court hereby appoints John P. Austin to act as special master to determine plaintiffs' rightful share of the

proceeds of the Night Ranger contract as provided in the court's order of March 20, 1987, as amended by its order of March 31, 1987.

2. On or before July 15, 1987, defendants shall prepare, serve and file an accounting showing all money received by them between February 4, 1983, and March 31, 1987, from the Night Ranger contract. The accounting shall identify the office overhead of the joint venture prior to its dissolution on May 1, 1983, and shall charge 60% thereof to plaintiffs. The accounting shall conclude with a statement of the amount due from defendants to plaintiffs.

3. Defendants are ordered and directed to make available to plaintiffs and the special master all books, records, statements, reports, financial data, and other documents or information that are in any way relevant to the accounting herein ordered.

4. Plaintiffs shall have 20 days after defendants' accounting is served and filed within which to file any objections thereto. If no objections are filed, the accounting shall be deemed correct and defendants shall forthwith pay to plaintiffs the amount thus determined to be due. If objections are filed, a hearing shall be had before John P. Austin, Special Master, who will take evidence and make a determination of the amount due plaintiffs as their rightful share of the proceeds of the Night Ranger contract as provided in the court's order of March 20, 1987, as amended March 31, 1987, referred to above. If requested by plaintiffs, defendant Bruce Cohn and his accountant shall appear to give testimony at the hearing. The decision of the special master will become the order of the court, subject to whatever appellate rights the parties may have.

5. Defendants shall render semiannual accountings hereinafter of all money received by them for managing the Night Ranger musical group under their existing contract, or any modification, renewal, or extension thereof, by serving and filing such within 20 days after June 30 and December 31 of each year, after which plaintiffs will have 20 days within which to object as above.

6. Upon determination of the amount due for each accounting period, as above, defendants shall forthwith pay that amount to plaintiffs, or their assignee.

7. This court retains jurisdiction over all of the matters relating to such accounting herein.

8. There is reserved to the parties their rights to appeal from any proceedings and any orders that have been or may hereafter be made herein. It is acknowledged that this order itself is based upon a stipulation by the parties. Neither this order nor the stipulation upon which it is based shall be deemed a waiver of any rights of the parties to challenge on appeal the legal propriety of anything ordered herein by the court to be done.

9. The court finds that there is no just reason for delay and that this is an appropriate case for entry of a final judgment under rule 54(b) of the Federal Rules of Civil Procedure. Accordingly, the Memorandum, Opinion, and Order of March 20, 1987, and the Amended Memorandum, Opinion, and Order of March 31, 1987, as supplemented by this order, shall be entered as a final judgment as of this date.

10. Nothing herein is intended to affect the right of the parties to a further trial on the issue of damages.

Dated: July 8, 1987

United States District Judge

It is stipulated and agreed that the court may enter the foregoing order.

Dated: July 1, 1987.

STARK, STEWART, WELLS
& ROBINSON

By: _____
John F. Wells

Attorneys for Plaintiffs

BIRENBAUM, LUSCUTOFF
& LENDORMY

By: _____
David B. Birenbaum

Attorneys for Defendants Bruce Cohn, Bruce Cohn Management, Inc., and Danjoe Corporation

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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

DECISION OF SPECIAL MASTER

AND RELATED COUNTERCLAIM

Pursuant the Order Appointing Special Master herein filed July 2, 1987, and the Supplemental Order (By Stipulation) filed July 7, 1987, John P. Austin, Esq. conducted a hearing on September 3, 1987. The parties appeared at the hearing through their respective counsel and evidence both oral and documentary was received. Counsel for the parties thereafter conferred and have reached the following agreement:

1. Defendants have accounted to plaintiff for all money received by them between February 4, 1983, and July 31, 1987, from the Night Ranger contract according to the books of defendant Bruce Cohn Management as follows:

FYE 11/83		
Account No. 3020	$ 25,461.93	
less Landry commission	(5,000.00)	
		$ 20,461.93
FYE 11/84		
Account No. 3020	336,300.73	
Account No. 3045	37,653.23	
	373,953.96	
less Landry commission	(36,382.63)	
		337,571.33
FYE 11/85		
Account No. 3020	$517,099.77	
Account No. 3045	71,689.22	
	$588,788.99	
less Landry commission	(9,661.50)	$579,127.49
FYE 11/86		
Account No. 3020	$313,738.86	
Account No. 3045	68,897.16	
	$382,636.02	
less Glaser commission	(4,935.00)	
		$377,701.02
12/86-7/87		
Account No. 3020	$155,025.45	
Account No. 3045	46,402.00	
		$201,427.45

2. The amounts due from defendants to plaintiffs as of 7/31/87, calculated pursuant to the Amended Memorandum Opinion and Order filed March 31, 1987, are as follows:

FYE 11/83	$20,461.93 × 12.5% =	$ 2,557.74
Interest @ 7%, 3 yrs., 8 mos.		656.48
FYE 11/84	337,571.33 × 12.5% =	42,196.42
Interest @ 7%, 2 yrs., 8 mos.		7,876.70
FYE 11/85	579,124.49 × 12.5% =	72,390.94
Interest @ 7%, 1 yr., 8 mos.		8,445.61
FYE 11/86	377,701.02 × 12.5% =	47,212.63
Interest @ 7%, 8 mos.		2,203.28
12/86-7/87	201,427.45 × 12.5% =	25,178.43
Agreed Adjustment re overhead		3,600.00
Total due Plaintiffs as of 7/31/87		$212,318.23

3. The defendants have agreed to the foregoing without prejudice to their rights to appeal as stated in paragraph 8 of the Supplemental Order of July 7, 1987.

Based on the foregoing, it is hereby determined that there is due to plaintiffs from defendants the sum of $212,318.23 plus interest thereon from and after July 31, 1987, as provided by 28 U.S.C. section 1961.

Dated: December 2, 1987

_____

Special Master

THE ABOVE IS APPROVED AS TO FORM:

STARK, STEWART, WELLS & ROBINSON

By: _____

John F. Wells

Attorneys for Plaintiffs

BIRENBAUM, LUSCUTOFF & LENDORMY

By: _____

David B. Birenbaum

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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

JUDGMENT

AND RELATED COUNTERCLAIM

The Decision of Special Master pursuant to this court's order of July 7, 1987, having been filed herein,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiffs have and recover from defendants the sum of $212,318.23 plus interest thereon from and after July 31, 1987, as provided by 28 U.S.C. section 19611.

Dated: December 2, 1987

United States District Judge

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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

JUDGMENT
(Amended)

AND RELATED COUNTERCLAIM

The Decision of Special Master pursuant to this court's order of July 7, 1987, having been filed herein,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiffs have and recover from defendants Bruce Cohn, Bruce Cohn Management, Inc., and Danjoe Corporation, and each of them, the sum of $212,318.23 plus interest thereon from and after July 31, 1987, as provided by 28 U.S.C. section 19611.

Dated: December 7, 1987

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona Corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona Corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California Corporation, and DANJOE CORPORATION, a corporation,

Defendants.

No. C-84-5229 WHO

MEMORANDUM AND ORDER

On January 5, 1987, this case came before the Court for jury trial of the liability issues only. The jury returned a special verdict finding that a joint venture agreement had been entered into by the parties on February 4, 1983, and that defendants breached their fiduciary obligations arising out of that contract. The jury further found that a certain letter of December 22, 1982, did not, in fact, contain all the terms of the later formed joint venture. The Court entered judgment for plaintiffs in accordance with the verdict. The parties stipulated to an accounting for the profits lost on the joint venture.

On March 31, 1987, this Court awarded to plaintiffs the amount of their lost profits, but reserved for future decision the question of whether plaintiffs were entitled to any additional damages based on the jury's special verdict finding a breach of defendants' fiduciary duties. Plaintiffs sent a letter to defendants on August 19, 1983, requesting an account of the proceeds of the joint venture, and defendants failed to respond to the letter in addition to failing to turn over the

proceeds. The Court found in its Amended Memorandum Opinion and Order ("Amended Order") filed March 31, 1987, that the evidence of defendants' actions on August 19, 1983, formed a sufficient bases for the jury's finding that defendants breached their fiduciary duties towards plaintiffs, despite contradictory evidence.

The only remaining issue to be tried in the case is what damages, if any, in addition to the award of lost profits, should be awarded to plaintiffs in compensation for defendants' tort of breach of fiduciary duty. Plaintiffs have claimed that they are entitled to a jury trial on their claims for consequential damages, damages for emotional distress, and punitive damages. The claimed consequential damages include moving expenses incurred by plaintiff David Katz and his family to relocate to California and loss on the sale of the Katz family home in Illinois. Plaintiffs have also claimed entitlement to emotional distress damages because of the tortious nature of a breach of fiduciary duty, particularly defendants' breach that was an intentional repudiation of the joint venture agreement. Finally, plaintiffs contend that defendants' conduct was so outrageous as to warrant the imposition of punitive damages.

The Court has already ruled that there is no basis in the evidence for an award of punitive damages and, therefore, the only possible damages left to be tried are consequential and emotional distress damages. Defendants have filed a motion to dismiss these damages on the grounds that: (1) the claimed consequential damages were not foreseeable (2) emotional distress damages cannot be awarded unless the jury finds the defendants committed the tort of intentional infliction of emotional distress; (3) the jury never found that defendants repudiated the joint venture agreement; (4) breach of fiduciary duty is not an independent tort; (5) the original jury cannot be reimpaneled; and (6) plaintiffs have failed to diligently prosecute the remaining damages so they should be dismissed.

First, defendants' arguments that the jury cannot be reassembled or that plaintiffs have failed to prosecute diligent-

ly are simply wrong. The original jury has been reassembled, and trial is now scheduled for July 13, 1988. Also, this matter has been through an appeal, an accounting, and other procedures that have prolonged the resolution of the damages phase of the case. These delays cannot be attributed to plaintiffs.

Second, defendants have misstated the evidence when they claim that the jury did not find that defendants repudiated the joint venture. The jury found that the specific breach of fiduciary duty by defendants occurred on August 19, 1983, the day that defendants ignored plaintiffs' demand for an accounting and kept the venture's proceeds for themselves. This was a clear repudiation of the joint venture agreement, which agreement the jury found to exist between the parties beginning on February 4, 1983. It was pursuant to the jury's findings that the Court awarded plaintiffs those profits that defendants had refused to turn over in accordance with the joint venture agreement.

Third, defendants have plainly misstated the law in arguing that breach of fiduciary duty is not a tort, and that tort damages cannot be recovered for this claim. As the Court held in its Amended Order, the California courts have specifically held that a partner in a joint venture may recover tort damages for the breach of fiduciary duty of a joint venturer in wrongfully excluding that partner from the venture. *Gherman v. Colburn*, 72 Cal.App.3d 544, 140 Cal.Rptr. 330 (1977). In the *Gherman* case, the court held that the trial judge properly instructed the jury that if they found a breach of fiduciary duty by the defendant joint venturer in that case, "the measure of damages is the amount which will compensate for all of the damage proximately caused thereby whether it could have been anticipated or not." 72 Cal.App.3d at 571. In so instructing, the court was merely quoting § 3333 of the California Civil Code, the general tort damage recovery provision, for it is hornbook law that an action for breach of fiduciary duty sounds in tort. *Gherman*, 72 Cal.App.3d at 571; *Boyd v. Bevilacqua*, 247 Cal.App.2d 272 (1966).

Pursuant to this legal authority, plaintiffs are entitled to bring forward evidence to support their claims of tort damages, but they must also prove that these damages were caused by defendants' breach of fiduciary duty. Section 3333 specifically provides that plaintiffs must prove that their damages were "proximately caused" by the breach of obligation by defendants. Cal. Civ. Code § 3333.

While it may be possible for plaintiffs to prove that emotional distress was caused by defendants' breach of fiduciary duty, it is clearly impossible as a matter of law to prove that the moving expenses or loss on the sale of the Katz home were caused by defendants' breach. Plaintiffs' own exhibits, numbered 1 through 6, prove that these damages were incurred in 1982 or earlier. Defendants' breach did not occur until August 19, 1983, and the parties had not even entered into the joint venture until February 4, 1983. While plaintiffs correctly argue that expenses incurred in anticipation of or in preparation for performance of a contract are recoverable, *see e.g., Walpole v. Prefab Manufacturing Co.*, 103 Cal.App.2d 472, 482 (1951), plaintiffs have cited no case, and this Court has found none, that has ever held recoverable those expenses incurred before entering into a contract. It is impossible for defendants' actions in repudiating the joint venture to have caused any of the consequential damages claimed by plaintiffs.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motion in limine to conclude trial and to dismiss remainder of case in bifurcated cause is granted, insofar as it requests the dismissal of plaintiffs' claims for consequential damages, but is denied in every other respect.

2. The trial on plaintiffs' claims for emotional distress damages, the only remaining triable issue in the case, will commence on Wednesday, July 13, 1988, at 8:00 a.m.

Dated: June 22, 1988

William H. Orrick
United States District Judge

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona Corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona Corporation,

Plaintiffs.

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California Corporation, and DANJOE CORPORATION, a corporation,

Defendants.

No. C 84 5229 WHO

JUDGMENT

AND RELATED COUNTERCLAIM

The jury trial in this case was bifurcated and the jury's verdict on the issues respecting liability was returned on January 2, 1986. Based upon that verdict, the court made its Amended Memorandum Opinion and Order on March 31, 1987, awarding plaintiffs the remedy of an accounting and on July 8, 1987, entered its Supplemental Order (By Stipulation) providing, among other things, that defendants shall make periodic accountings to plaintiffs. On December 2, 1987, the Decision of Special Master determined the accounting through July 31, 1987, and on December 17, 1987, the court entered a judgment thereon.

On June 24, 1988, the court entered its Memorandum and Order granting defendants' motion to dismiss certain of plaintiffs' damage claims, and on July 13, 1988, a trial was held on the issue of damages for emotional distress. The jury returned its verdict in favor of plaintiff David Katz and against defendants Bruce Cohn, Bruce Cohn Management,

Inc., and Danjoe Corporation for emotional distress damages in the amount of $55,000.

IT IS ORDERED that plaintiff David Katz have judgment against defendants Bruce Cohn, Bruce Cohn Management, Inc., and Danjoe Corporation, and each of them, for $55,000 and for his costs of suit.

The court retains jurisdiction over all matters relating to the accounting for periods after July 31, 1987, pursuant to its Supplemental Order (By Stipulation) entered herein on July 8, 1987.

Dated: Aug 11, 1988

WILLIAM H. ORRICK
United States District Judge

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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

ORDER DENYING COHN DEFENDANTS' MOTIONS FOR DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR NEW TRIAL

This matter came on regularly to be heard on October 27, 1988, the parties appearing through their respective counsel. The matter having been briefed and argued, and good cause appearing therefor,

IS IT ORDERED that the motions of defendants BRUCE COHN, BRUCE COHN MANAGEMENT, INC., and DANJOE CORPORATION for a directed verdict or judgment notwithstanding the verdict is denied.

IT IS FURTHER ORDERED that defendants' motion for a new trial is denied.

Dated: Nov. 8, 1988

William H. Orrick
United States District Judge

Lise A. Pearlman, Esq.
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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation, *Plaintiffs,* vs. MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, a corporation, *Defendants.*	No. 084 5229-WHO **COMPLAINT FOR DAMAGES, CONSTRUCTIVE TRUST, AND AN ACCOUNTING FOR BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS, PROMISSORY FRAUD AND CONVERSION** **JURY DEMANDED**

Plaintiffs allege:

JURISDICTION AND VENUE

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1332(a). The matter in controversy exceeds $100,000, exclusive of interest and costs and there is diversity of citizenship between plaintiffs and each of the defendants. Venue is based upon 28 U.S.C. section 1391(a).

THE PARTIES

2. Plaintiff David Katz ("Katz") is a citizen of the State of Illinois. Katz-Cohn Management, Inc. and Katz-Cohn Productions, Inc. (hereafter sometimes collectively referred to as "the Katz-Cohn companies") are both Arizona corporations, having their principal place of business in the State of Illinois.

3. Plaintiffs allege on information and belief that Bruce Cohn and Martin Cohn are both citizens of the State of California residing in the Northern District and that Bruce Cohn Management, Inc., and Danjoe Corporation ("Danjoe") are California corporations with their principal place of business in the Northern District of California.

OPERATIVE FACTS

4. In or about April of 1982, Katz and Martin Cohn entered into an oral partnership agreement for the purpose of managing, producing and publishing the work of artists and performers in the field of musical entertainment. As part of this agreement, they caused two corporations to be formed in or about June of 1982: plaintiffs Katz-Cohn Productions, Inc. and Katz-Cohn Management, Inc. At all times herein mentioned Katz was and is a director and officer and principal shareholder of both companies. At all times herein mentioned Martin Cohn was a minority shareholder in both companies and a director and officer of both companies until he resigned those positions in June of 1983.

5. As part of the partnership agreement, Katz and Martin Cohn agreed that Martin Cohn would be employed full time by the Katz-Cohn companies and would use his best efforts on behalf of the companies to obtain management, production and music publishing contracts with talented artists and to perform the companies' obligations under such contracts. It was further agreed that Katz would loan the Katz-Cohn companies funds to meet initial expenses which funds were to be repaid out of corporate profits prior to the distribution of any dividends.

6. On or about September 1, 1982, in Sonoma, California, Katz and Martin Cohn and the Katz-Cohn companies entered into an oral joint venture agreement with Martin-Cohn's brother, Bruce Cohn, and his company, Bruce Cohn Management, Inc. (hereafter collectively referred to as "Bruce Cohn") for the purpose of managing, producing and publishing the work of artists and performers in the field of musical entertainment. The parties agreed that Katz and Martin Cohn would move to California and set up a joint venture office with Bruce Cohn in Sonoma, California; that the Katz-Cohn companies would contribute to the joint venture their existing contracts and all parties would contribute any new contracts which they obtained with entertainment group or artists. The joint venturers agreed to use their best efforts on behalf of the joint venture to carry out the management obligations on existing contracts and to locate and sign additional artists. They agreed that the proceeds from all contracts with artists would be divided 66⅔% to the Katz-Cohn companies and 33⅓% to Bruce Cohn. In reliance upon that agreement, Katz returned to Chicago, Illinois, sold his home and prepared to move his family to California.

7. In or about December of 1982, Bruce Cohn began negotiating a management contract on behalf of the joint venture with a musical group called Nightranger. Thereafter, Bruce Cohn demanded that Katz and Martin Cohn agreed to a modification of the joint venture agreement, whereby Bruce Cohn would retain two-thirds of the net proceeds of a management contract with Nightranger instead of the one-third that had been previously agreed; the initial expenses of the office would be shared 60% by the Katz-Cohn companies and 40% by Bruce Cohn; and, in the event of the ultimate dissolution of the joint venture, Katz and Martin Cohn and the Katz-Cohn companies would be entitled to one-sixth of the proceeds from any contract with Nightranger which Bruce Cohn might manage after dissolution and Bruce Cohn would be entitled to the same percentage of any contracts which Katz and Martin Cohn or their companies might maintain upon dissolution. Katz and Martin Cohn and the Katz-Cohn companies agreed to the modification of the joint venture

agreement under economic duress and without receiving any consideration therefor.

8. On or about January 18, 1983, Bruce Cohn Management, Inc. entered into a five year management agreement with Nightranger for the benefit of the joint venture. In the meantime, Katz moved his family to California and the joint venture opened its offices at 370 W. Napa Street, Sonoma, California. In addition to servicing the existing contracts, David Katz and Martin Cohn entered into negotiations on behalf of the joint venture for a management contract with a new group called Billy Satellite.

9. In or about March of 1983, Bruce Cohn formed a new corporation, Danjoe Corporation, to which plaintiffs are informed and believe Bruce Cohn assigned the management contract with Nightranger. At or about the same time, Bruce Cohn proposed several major modifications to the joint venture agreement which were rejected and the parties continued to operate the joint venture as before.

10. In April of 1983, Martin Cohn resigned as an employee of the Katz-Cohn companies and informed Katz that he was negotiating a management contract with Billy Satellite on his own behalf. Shortly thereafter, Bruce Cohn repudiated the joint venture agreement and demanded that the Katz-Cohn companies remove their equipment from the joint venture offices. In June of 1983, deprived of access to the joint venture offices and participation in the joint venture or the proceeds thereof, Katz moved his family back to Chicago, Illinois.

COUNT ONE

(Breach of Partnership Agreement)

11. Plaintiff Katz hereby incorporates by reference the allegations of paragraph 1 through 10 above.

12. Plaintiff Katz performed all obligations of the partnership agreement with Martin Cohn on his part to be performed.

13. Defendant Martin Cohn breached the partnership agreement by wrongfully misappropriating the benefits of the partnership for himself and excluding plaintiff Katz from participation therein.

14. As a proximate result of defendant's breach, Katz has suffered damages including loss of the value of his interest in the partnership, loss of partnership profits, unrepaid advances, uncompensated labor, emotional distress and losses suffered from the sale of his home in Chicago and relocation of his family in reliance upon the partnership agreement. The exact amount of such damages has not at this time been fully ascertained but is estimated to be in excess of $500,000. Plaintiff prays leave to amend this complaint and state the amount of damages according to proof.

COUNT TWO

(Breach of Fiduciary Duty and Imposition of Constructive Trust)

15. Plaintiffs hereby incorporate by reference the allegations of paragraph 1 through 14 above.

16. The relationship between plaintiff and Martin Cohn was fiduciary in nature by virtue of the partnership agreement between Martin Cohn and Katz and Cohn's capacity as an officer and director of the Katz-Cohn companies. Martin Cohn thereby owed plaintiffs a duty to deal with them in utmost good faith.

17. Defendant Martin Cohn breached his fiduciary duty to plaintiffs by, among other things, usurping the opportunity to enter into a management contract with Billy Satellite and by misappropriating other property and funds belonging to plaintiffs including the benefit of plaintiffs' management contract with an artist named Keith England. Plaintiffs are entitled to have a constructive trust imposed in favor of plaintiffs upon all property, interests and profits acquired by defendant Martin Cohn in breach of his fiduciary duty.

18. In doing the acts herein alleged, defendant acted with oppression, fraud and malice, thereby entitling plaintiffs to punitive damages.

COUNT THREE

(Accounting)

19. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 18 above.

20. From June of 1983 to the present defendant Martin Cohn has wrongfully failed and refused to make any accounting to plaintiffs of the income or disbursements, or of the net profits or losses associated with the assets of plaintiffs under defendant's control, despite plaintiffs' entitlement to the same.

COUNT FOUR

(Breach of Joint Venture Agreement)

21. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 10, above.

22. Plaintiffs have performed all obligations required by them on their part to be performed in accordance with the terms of the joint venture agreement.

23. Plaintiffs are informed and believe and thereupon allege that in doing the acts herein alleged each of the defendants acted as agent for the others and within the course and scope of such agency.

24. Defendants breached the joint venture agreement by misappropriating the benefits of the joint venture for themselves including management contracts with Keith England, Nightranger and Billy Satellite and excluding plaintiffs from participation therein.

25. As a proximate result of the defendants' breach, plaintiffs have suffered damages including loss of the value of their interest in the joint venture, loss of the profits of the

joint venture, unrepaid advances owing to plaintiff Katz, uncompensated labor on behalf of the joint venture, emotional distress and losses suffered from the sale of Katz's home in Chicago and relocation of his family in reliance upon the joint venture agreement. As a further proximate result of defendant's breach, the Katz-Cohn companies have suffered damages including lost profits and loss of goodwill. The exact amount of such damages has not at this time been fully ascertained but is estimated to be in excess of $500,000. Plaintiffs pray leave to amend this complaint and state the amount of damages according to proof.

COUNT FIVE

(Breach of Fiduciary Duty and Imposition of Constructive Trust)

26. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 10 and paragraphs 21 through 25 above.

27. By virtue of the joint venture which existed between them, the relationship between plaintiffs and defendants was fiduciary in nature and defendants owed plaintiffs a duty to deal with them in utmost good faith. Defendants breached their duties by wrongfully misappropriating benefits of the joint venture business for themselves and excluding plaintiffs from participation therein. Plaintiffs are thereby entitled to have a constructive trust imposed in their favor upon the property, interests and profits acquired by defendants in breach of their fiduciary duty.

28. In doing the acts herein alleged, defendant acted with oppression, fraud and malice, thereby entitling plaintiffs to punitive damages.

COUNT SIX

(Rescission of Joint Venture Modification)

29. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 10 and 21-28 above.

30. Plaintiffs are entitled to and do hereby rescind the modifications to the joint venture agreement which were adopted in December of 1982 upon the demand of Bruce Cohn without consideration and under duress.

COUNT SEVEN

(Accounting)

31. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 11 and 21-30 above.

32. Commencing in or about April of 1983, defendants have failed and refused to make any accounting to plaintiffs of the income or disbursements or of the net profits or losses of the joint venture despite plaintiffs' entitlement to the same.

COUNT EIGHT

(Unfair Competition—Intentional Interference With Economic Relations—Conspiracy)

33. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 32 above.

34. Plaintiffs are informed and believe and thereupon allege that in doing the acts alleged above defendants engaged in acts of unfair competition within the meaning of Business and Professions Code section 17200 and that defendants willfully, knowingly and maliciously conspired and agreed among themselves to interfere with and appropriate for themselves contracts and business opportunities of the plaintiffs and the joint venture and to exclude plaintiffs from their interests in the joint venture.

35. As a proximate result of defendants' conduct, plaintiffs have suffered damages as alleged in paragraph 25 above.

36. In doing the acts herein alleged, defendant acted with oppression, fraud and malice, thereby entitling plaintiffs to punitive damages.

COUNT NINE

(Conversion and Imposition of Constructive Trust)

37. Plaintiff hereby incorporate by reference the allegations of paragraphs 1 through 36 above.

38. Plaintiffs are informed and believe and thereupon allege that defendants' conduct constitutes the wrongful conversion of property and interests of plaintiffs and the joint venture. Plaintiffs have demanded the return of such property and interests, but defendants have refused and continue to refuse to return the same. Plaintiffs are entitled to have a constructive trust imposed upon the converted property and interests and the proceeds thereof in favor of plaintiffs and the joint venture as their respective interests appear.

39. As a proximate result of defendants' conduct, plaintiffs have suffered damages from loss of the value of the property and interests converted by defendants, loss of the time and money expended by plaintiffs in pursuit of such assets, and from plaintiff Katz's emotional distress in a sum as yet to be ascertained. Plaintiff pray leave to amend this complaint to state such damages according to proof.

40. In doing the acts herein alleged, defendant acted with oppression, fraud and malice, thereby entitling plaintiffs to punitive damages.

COUNT TEN

(Promissory Fraud)

41. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 40 above.

42. In entering into the partnership agreement alleged in paragraph 4 above and the joint venture agreement alleged in paragraph 6 above, defendant Martin Cohn represented that he intended to honor such agreements. In entering into the joint venture agreement in November of 1982, defendant Bruce Cohn likewise represented that he intended to honor such agreement. These representations were knowingly false

and were made by defendants with the intent to cause plaintiff Katz to rely on them.

43. Plaintiff Katz believed and relied on these representations and was thereby induced to sell his home in Chicago, Illinois, move to California, work for the joint venture and advance funds to pay expenses of the joint venture.

44. As a proximate result of defendants' fraud, plaintiffs have suffered damages as alleged in paragraph 25 above.

45. In doing the acts herein alleged, defendant acted with oppression, fraud and malice, thereby entitling plaintiffs to punitive damages.

WHEREFORE, plaintiffs pray judgment as follows:

Against Defendant Martin Cohn

1. *Count One* (Breach of Partnership Agreement): For compensatory damages according to proof.

2. *Count Two* (Breach of Fiduciary Duty): For imposition of a constructive trust and punitive damages.

3. *Count Three* (Accounting): For an accounting.

Against All Defendants

4. *Count Four* (Breach of Joint Venture Agreement): For compensatory damages according to proof.

5. *Count Five* (Breach of Fiduciary Duty): For imposition of a constructive trust and punitive damages.

6. *Count Six* (Rescission): For rescission of the December 1982 modifications to the joint venture agreement.

7. *Count Seven* (Accounting): For an accounting.

8. *Count Eight* (Intentional Interference): For compensatory damages according to proof and punitive damages.

9. *Count Nine* (Conversion): For imposition of a constructive trust; compensatory damages according to proof and punitive damages.

10. *Count Ten* (Promissory Fraud): For compensatory damages according to proof and punitive damages.

11. For costs of suit and such other and further relief as the court may deem just.

DATED: August 1, 1984

STARK, STEWART, WELLS
& ROBINSON

by _____
Lise A. Pearlman
Attorneys for Plaintiffs

Plaintiffs hereby demand a jury trial.

DATED: August 1, 1984

STARK, STEWART, WELLS
& ROBINSON

by _____
Lise A. Pearlman
Attorneys for Plaintiffs

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Attorneys for Defendants
BRUCE COHN, BRUCE COHN
MANAGEMENT, INC., and
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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Plaintiffs,

vs.

MARTIN COHN, BRUCE COHN, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a corporation,

Defendants.

Case No. C84-5229 WHO

ANSWER TO COMPLAINT

In answer to the unverified Complaint on file herein, defendant Bruce Cohn by and through his attorneys Birenbaum, Luscutoff & Lendormy, for himself, for defendant Bruce Cohn Management, Inc., and for defendant Danjoe, Corp. generally and specifically denies each and every allegation of the Complaint except as set forth below.

1. These answering defendants have no information or belief sufficient to enable them to answer the allegations of paragraph 1 of the Complaint relating to the diversity of citizenship of the parties and therefore deny such allegations.

2. These answering defendants have no information or belief sufficient to enable them to answer the allegations of paragraph 2 of the Complaint and therefore deny such allegations.

3. These answering defendants admit that Bruce Cohn is a resident of California, and that Bruce Cohn Management, Inc., and Danjoe Corp. are California corporations with their principal place of business in the Northern District of California, but have no information or belief sufficient to enable them to answer the allegations of paragraph 3 of the Complaint as they relate to Martin Cohn and therefore deny such allegations.

4. These answering defendants have no information or belief sufficient to enable them to answer the allegations of paragraphs 4 and 5 of the Complaint and therefore deny such allegations.

5. Answering paragraph 7 of the Complaint, these answering defendants admit only that Bruce Cohn began negotiating a management contract with "Nightranger" sometime in late 1982, but with this sole exception, deny each and every remaining allegation of said paragraph and specifically deny the existence of any joint venture with plaintiff.

6. Answering paragraph 8 of the Complaint, these answering defendants admit that Bruce Cohn Management, Inc., entered into a five-year management agreement with "Nightranger" in early 1983, but with this sole exception, deny each and every remaining allegation of said paragraph and specifically deny the existence of any joint venture with plaintiff.

7. Answering paragraph 9 of the Complaint, these answering defendants admit that Danjoe Corporation was formed in March of 1983 and that it is the current holder of the "Nightranger" management contract, but with this sole exception, deny each and every remaining allegation of said paragraph and specifically deny the existence of any joint venture with plaintiff.

8. These answering defendants have no information or belief sufficient to enable them to answer the allegations of

paragraph 10 of the Complaint and therefore deny such allegations.

9. These answering defendants have no information or belief sufficient to enable them to answer the allegations of paragraphs 12, 13, 14, 16, 17, 18 and 20 of the Complaint and therefore deny such allegations.

10. Answering paragraph 32 of the Complaint, these answering defendants admit not having made any accounting to plaintiff from April 1983 to the present, but deny plaintiff's entitlement to the same.

11. These answering defendants have no information or belief sufficient to enable them to answer the portions of paragraph 42 of the complaint relating to Martin Cohn and therefore deny such portions. Additionally, these answering defendants specifically deny the existence of any joint venture with plaintiff.

12. These answering defendants have no information or belief sufficient to enable them to answer the allegations of paragraph 43 of the Complaint and therefore deny such allegations.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against any of these answering defendants upon which relief can be granted.

Dated: August 22, 1984

BIRENBAUM, LUSCUTOFF
& LENDORMY

By: _____
David B. Birenbaum

Attorneys for Defendants
Bruce Cohn, Bruce Cohn
Management, Inc., and
Danjoe Corporation

PROOF OF SERVICE

I declare that I am employed in the City and County of San Francisco, California, in the office of a member of the Bar of this Court; I am over the age of eighteen years and not a party to the within entitled cause; my business address is Opera Plaza, Suite 2030, 601 Van Ness Avenue, San Francisco, CA 94102. On this day I served the attached:

ANSWER TO COMPLAINT

on the interested parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Lise A. Pearlman, Esq.
STARK, STEWART, WELLS & ROBINSON
CitiCorp Savings Plaza
180 Grand Avenue, Suite 1400
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on August 22, 1984, at San Francisco, California.

TEDD BARNFIELD

BEST AVAILABLE COPY

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Defendants.

Case No. C84-5229 WHO

JOINT PRETRIAL STATEMENT

AND RELATED COUNTERCLAIM

Pursuant to Local Rule 235-7 and the Order for Pretrial Conference entered by this court on November 2, 1984, the parties hereby submit the following joint pretrial statement:

(a) *Parties*

This pretrial statement is submitted on behalf of plaintiffs David Katz, Katz-Cohn Productions, Inc., and Katz-Cohn Management, Inc., and defendants Bruce Cohn, Bruce Cohn Management, Inc., and Danjoe Corporation. The claims between Katz and the Katz-Cohn companies and defendant and counterclaimant Martin Cohn have been settled and dismissed.

(b) *Jurisdiction and Venue*

This is a diversity action. Jurisdiction is based on 28 U.S.C. section 1332(a) and venue is based on 28 U.S.C. section 1391(a).

(c) *Substance of the Action*

Plaintiffs' complaint seeks contract and tort damages and an accounting from defendants based on the following facts. David Katz and Martin Cohn formed the two plaintiff companies in July of 1982 for the purpose of managing and producing popular music artists. Plaintiffs allege that in the fall of 1982 a joint venture was formed among Katz, Martin Cohn and their companies, and Martin Cohn's brother, Bruce Cohn, and his company, Bruce Cohn Management, Inc., for the purpose of managing and producing popular music artists. Plaintiffs allege that they contributed to the joint venture their existing management/production contracts and that each of the parties agreed that any management/production contract obtained by any of them thereafter would belong to the joint venture. Plaintiffs allege that the joint venture operated until the spring of 1983 when Bruce Cohn repudiated the joint venture agreement, and thereafter refused to account for the proceeds of a management/production contract with a musical group called "Night Ranger."

The complaint contains ten counts of which three remain: breach of the joint venture agreement; breach of fiduciary

duty; promissory fraud; and imposition of constructive trust and accounting for misappropriating the benefits of the joint venture.

The answer of defendants Bruce Cohn, Bruce Cohn Management, Inc., and Danjoe Corporation deny the existence of the joint venture and affirmatively alleges that the complaint fails to state a claim against any of them.

(c) *Undisputed Facts*

The following facts are undisputed:

1. Bruce Cohn is a resident of California, and Bruce Cohn Management, Inc. and Danjoe Corporation are California corporations with their principal place of business in the Northern District of California.

2. Katz-Cohn Management, Inc. and Katz-Cohn Productions, Inc. are corporations organized and existing under the laws of the State of Arizona, and duly qualified to conduct business in the State of California with valid certificates of qualification evidencing the same.

(e) *Disputed Factual Issues*

1. Whether a joint venture was formed between plaintiffs and defendants and, if so, its terms.

2. The amount of damages caused plaintiffs by defendants' failure to honor the joint venture agreement.

3. Whether Bruce Cohn fraudulently induced David Katz to move himself and his family to California by falsely promising to form a joint venture and, if so, whether David Katz relied on such promise to his detriment and suffered damages as a result thereof, including emotional distress.

4. Whether defendants are liable for punitive damages based upon fraud or the bad faith repudiation of the joint venture agreement.

(f) *Relief Prayed*

1. For breach of the joint venture agreement and breach of fiduciary duty, plaintiffs seek imposition of a constructive

trust and an accounting for their share of the revenue of the Night Ranger contract, plus consequential damages, including loss on the sale of the Katz, residence and moving and other expenses associated with the joint venture.

2. For fraud and bad faith repudiation of the joint venture agreement, plaintiffs seek compensatory damages, including damages for emotional distress, and punitive damages.

(g) *Disputed Points of Law*

None.

(h) *Previous Motions*

None.

(i) *Witnesses to be Called*

See separate statements of the parties.

(j) *Exhibits, Schedules and Summaries*

See separate exhibit lists and exhibits lodged with the court.

(k) *Further Discovery or Motions*

No motions are contemplated.

(l) *Stipulations*

The parties stipulate to the use of copies in place of originals as trial exhibits. They further stipulate that the management/production contract between Bruce Cohn Management, Inc. and "Night Ranger" currently in effect is the one dated January 14, 1983 together with the addendum attached thereto of the same date.

(m) *Amendments and Dismissals*

Dismissals of the complaint as to Martin Cohn only, and of the entire counterclaim of Martin Cohn have been filed.

(n) *Settlement Discussions*

Settlement discussions between David Katz and Martin Cohn have resulted in settlement. Settlement discussions have taken place between plaintiffs and defendant Bruce Cohn, but seem unlikely to lead to settlement.

(o) *Agreed Statement*

None is contemplated.

(p) *Bifurcation or Separate Trial of Issues*

None is requested.

(q) *Reference to Master or Magistrate*

If plaintiffs establish the right to an accounting, the accounting might be referred to a master or magistrate.

(r) *Appointment and Limitation of Experts*

The parties do not contemplate the court appointing any experts nor do they seek any limitation on expert testimony.

(s) *Trial*

The trial is now set for June 23, 1986. A jury trial was timely requested by plaintiffs.

(t) *Estimate of Trial Time*

The parties estimate that four to five court days will be required for the trial.

(u) *Claim of Privilege or Work Product*

The parties claim that to set out in complete detail all testimony to be presented by all witnesses would violate the work product rule. With that exception, the parties make no claim of privilege or work product with respect to matters required to be stated by Local Rule 235-7.

(v) *Miscellaneous*

The parties do not contemplate any other matters required to be decided at the pretrial conference.

Dated: May 14, 1986

STARK, STEWART, WELLS
& ROBINSON

By: _____
John F. Wells

Attorneys for Plaintiffs

BIRENBAUM, LUSCUTOFF
& LENDORMY

By: _____
David B. Birenbaum

Attorneys for Defendants Bruce Cohn, Bruce Cohn Management, Inc., and Danjoe Corporation

Text of Statutes and Constitutional Provisions Involved

1. **United States Constitution, Fifth Amendment:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **United States Constitution, Seventh Amendment:**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law.

3. **Federal Rule of Civil Procedure 15(b):**

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence

would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

4. **Federal Rule of Civil Procedure 16(e):**

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

5. **Federal Rule of Civil Procedure 38(a)-(d):**

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A

demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

6. **Federal Rule of Civil Procedure 48:**

The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of the stated majority of the jurors shall be taken as the verdict or finding of the jury.

7. **Federal Rule of Civil Procedure 49(a):**

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

8. **Federal Rule of Civil Procedure 54(b):**

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final

judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

90-410

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

BRUCE COHN, individually, BRUCE COHN MANAGEMENT, INC. a California corporation. and DANJOE CORPORATION, a California corporation,
Petitioners,

v.

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

INTRODUCTION

This petition for writ of certiorari is so utterly devoid of merit that it could be considered frivolous. This was a damage suit arising under state law for breach of an oral joint venture agreement, tried as a diversity case in the district court. Jury verdicts resulted in judgments which were affirmed by the Court of Appeals in an unpublished opinion. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals. It does not decide a federal question in a way in conflict with a state court of last resort. Indeed, it does not decide any federal question at all, nor was there any departure from the

accepted and usual course of judicial proceedings such as to call for an exercise of this court's power of supervision. In short, none of the considerations governing review on certiorari are present. (See Rule 10 of the Supreme Court Rules.)

The petition makes three arguments:

1. That the pleadings and pre-trial statement failed to give adequate notice of the issues to be tried, which were contrary to judicial admissions made by respondents;

2. That petitioners were denied due process because the reconvened jury in the second part of the bifucated trial included only six of the original eight jurors; and

3. That the trial court committed an error when, in the damages phase of the trial, it excluded petitioner Bruce Cohn's proferred testimony of his good faith in denying the existence of the joint venture agreement.

These arguments obviously do not warrant this court's consideration. Furthermore, as we will briefly demonstrate, each is wrong on the merits; the decision of the court of appeals was correct.

II

ARGUMENT

A. The Joint Venture Contract Found By the Jury to Have Been Entered Into On February 4, 1983 Was Within the Issues Framed By the Pleadings and the Pretrial Statement

(Answering the Petition for Writ of Certiorari, pp. 10-18)

The complaint alleged that the parties entered into an oral joint venture agreement on or about September 1, 1982 (Complaint ¶ 6, Appendix A-50), that it was amended in or about December 1982 (*Id.* at ¶ 7), and that in or about March, 1983, petitioner Bruce Cohn proposed several modifications to the joint venture agreement which were rejected (*Id.* at ¶ 9). The joint pretrial statement included as a disputed factual issue "whether a joint venture was formed between plaintiffs and defendants and, if so, its terms". (Joint Pretrial Statement, ¶ 2E1, Appendix A-65)

The Court of Appeals correctly rejected petitioners' claim that the jury's conclusion that the joint venture was formed in February, 1983, was outside the issues framed by these documents. (Opinion of the Court of Appeals, Appendix A-3.)

Nor were there any judicial admissions limiting formation of the contract to the fall of 1982. Respondents sued for breach of a joint venture agreement that resulted from discussions which began in the fall of 1982 and continued thereafter for a number of months. The evidence presented at the trial covered the entire course of dealing between the parties.

As the record shows, this case involved only one joint venture, the terms of which were first seriously discussed beginning in October 1982. Respondents contended that the joint venture was formed then and later modified in December 1982 but not thereafter. (R.T. 684-686, 689.) Petitioners argued that no joint venture agreement was ever reached. (R.T. 481-482.) The jury, however, choose February 4, 1983 (the date of a meeting among all of the parties and their attorneys) as the date of the agreement, presumably because the jury found that to be the date when the terms of the joint venture agreement were finally settled. (See the Amended Memorandum Opinion and Order, Appendix A-21 to A-23.)

Neither side contended that the agreement was finalized at the February 4 meeting. Respondents argued that it had been finalized earlier, and petitioners argued that it was never finalized. (R.T. 481-482.) The jury found a middle ground between those conflicting contentions, finding in respondents' favor that a joint venture agreement had been reached, but on terms less favorable to respondents than they claimed. Petitioners' argument that the complaint, pretrial statement, and arguments of counsel at trial constituted judicial admissions inconsistent with the jury's verdict adds nothing to the argument that they did not get fair notice of the issues. If petitioners' argument were accepted, it would mean that no plaintiffs' verdict could ever be sustained if the plaintiffs had argued for or alleged that the facts justified greater or different relief than that which was in fact awarded.

B. The Court Properly Re-Impaneled the Six Available Jurors for the Damages Phase of the Trial

(Answering the Petition for Writ of Certiorari, pp. 18-22)

Petitioners' argument that they were denied due process when the jury was re-impaneled for the second phase of the trial is difficult to follow. While they assert that the delay between the two trials was unfair to them, they have not offered any evidence that they were prejudiced. They suggest that they were prejudiced by the fact that only six of the eight original jurors were available for the damages phase of the trial. But all that either party was entitled to in the first place was a six person jury; eight jurors were impaneled by stipulation. (R.T. 1-19.) Petitioners expressly stipulated to the possibility of a six person jury in the event of "los[ing]" up to two jurors. (R.T. 1-19.) Petitioners argue that had their counsel "even remotely suspected that the ensuing events would in fact occur, they would have likely made different choices on peremptory challenge." (Petition For Writ Of Certiorari, pp. 21.) But petitioners do not explain why that should invalidate the stipulation that the trial would proceed with a six-person jury in the event that two were lost.[1]

Petitioners have not cited any authority for the proposition that the delay in commencement of the second phase of the trial was reversible error or constituted denial of a constitutional right. Instead, they cite cases for the proposition that it is error to order

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[1] Petitioners' argument respecting their use of peremptory challenges is indecipherable. They do not state any logical reason why their counsel would have desired to have different people on the jury if he had known that up to two jurors might be lost because they could not be located, rather than because they were ill. At one point, petitioners concede that in jury selection, ". . . precise formulas and stratagems quickly yield to visceral choice." (*Id.*) In the next breath, they suggest that the eight jurors chosen were acceptable to their counsel because of "a preceived group personality." (*Id.*) Petitioners do not explain why their counsel's "visceral choice" in choosing the eight jurors would have been different if he had known in advance that two of the jurors would not be available for the second trial. In any event, one purpose of the stipulation respecting jury size was to deal with just such eventualities.

liability and damages to be tried before *different* juries where the issues are so interwoven that confusion and uncertainty will result. (*Id.* at 20.) These cases, of course, are inapplicable here because the damages phase of the trial was not tried to a new jury but to the same jury which had heard the liability phase, less two of its members who could not be located.

In any event, under the principle cited by petitioners, the trial of the damages phase to a separate jury would not have been improper because the issue to be tried—whether respondent David Katz had sustained compensable emotional distress as a result of petitioners' breach of fiduciary duty—was not so intertwined with the liability issues as to cause confusion or uncertainty. Contrary to petitioners' argument, the "substantive good or bad faith quality of petitioners' conduct" and the "net effect of such conduct on the respondents in terms of damage, including emotional distress" were not central to both liability and damages. The first of these two issues was not presented in the damages phase of the trial,[2] and the second was not presented in the liability phase and was the only issue in the damages phase. In short, the issues presented in the two phases of the trial were separate and distinct.

The trial judge's decision to reconvene six of the eight jurors who were available for the second phase of the trial was well within his discretion. There is no evidence that it prejudiced petitioners in any respect. Petitioners are grasping at straws.

C. The Trial Court Properly Excluded Petitioner Bruce Cohn's Testimony As to His Good Faith From the Damages Phase of the Trial

(Answering the Petition for Writ of Certiorari, pp. 22-24)

In the liability phase of the trial, the jury was presented with the question whether petitioners had breached their fiduciary duty to respondents. Bruce Cohn and his witnesses testified at length to their version of the facts and no evidence of their good faith was excluded. At the conclusion of the liability phase, the jury was instructed that it was to decide "whether Bruce Cohn violated his

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[2] See section IIC, *infra*, of this memorandum.

fiduciary duty . . . to act in the highest good faith." (R.T. 4-664.) The jury then determined that respondents had breached their fiduciary duty. (See R.T. 149, Defendants/Appellant's Excerpts 69-70.)

Under California law, emotional distress damages may be awarded for intentional wrongdoing. See, e.g., *Jahn v. Brickey*, 168 Cal.App.3d 399, 407, 214 Cal.Rptr. 119, 124 (1985); *Quezada v. Hart*, 67 Cal.App.3d 754, 761, 136 Cal.Rptr. 815, 819 (1977). There is no requirement that there be a finding of bad faith or fraudulent misconduct. See, e.g., *Young v. Bank of America Nat'l Trust & Sav. Ass'n*, 141 Cal.App.3d 108, 114, 190 Cal.Rptr. 122, 126 (1983) (cited in *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1499 (9th Cir. 1986)). See also, *Pintor v. Ong*, 211 Cal.App.3d 837, 259 Cal.Rptr. 577, 581-82 (1989) (following *Young*); *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal.App.3d 1394, 1402-03, 245 Cal.Rptr. 606, 611 (1988) (same). In the damages phase, the trial judge properly instructed the jury on the general measure of tort damages under Cal. Civ. Code Section 3333.[3]

Bruce Cohn's proferred testimony as to his good faith and reasonable belief that he owed no fiduciary duty was irrelevant at the damages phase of the trial. The trial judge did not abuse his discretion in excluding such testimony, and the jury instructions were proper.

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[3] Cal. Civ. Code Section 3333 provides in pertinent part:

> For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

III

CONCLUSION

Nothing about this case merits review by this Court. The jury findings were squarely within the issues to be tried; petitioners' jury trial right was not violated; and the trial judge did not err in excluding evidence proferred by petitioners during the damage phase of the trial. Certiorari should be denied.

Respectfully submitted,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI[1]

[1] In accordance with Supreme Court Rule 29.1, Petitioners hereby submit the following list of parties:

(Continued on following page)

I. THE RESPONDENTS' BRIEF *CONFIRMS* THAT THEY WERE ALLOWED TO RECOVER ON AN *UN*PLEADED AND *UN*LITIGATED THEORY OF RECOVERY. THE BRIEF ALSO CONFIRMS THE NEED TO PROVIDE THE LOWER COURTS WITH EFFECTIVE GUIDANCE AS TO THE DUE PROCESS IMPLICATIONS OF PRETRIAL STATEMENTS AND JUDICIAL ADMISSIONS.

A. Oh. *Those* Judicial Admissions . . . .

To their credit, Respondents forthrightly **admit** (on page 3 of their Opposition Brief) that:

> As the record shows, this case involved only one joint venture, the terms of which were first seriously discussed beginning in October 1982. *Respondents contended that the joint venture was formed then and later modified in December 1982 but not thereafter.* [Emphasis added.]

The Respondents further admit (on page 3 of their Opposition Brief) that:

> Neither side contended that the agreement was finalized at the February 4 meeting. *Respondents*

(Footnote 1 continued from previous page)

Petitioners (defendants below) are Bruce Cohn, Bruce Cohn Management, Inc. (a California corporation) and Danjoe Corporation (a California corporation).

Respondents (plaintiffs below) are David Katz, Katz-Cohn Productions, Inc. (an Arizona corporation), and Katz-Cohn Management, Inc. (an Arizona corporation).

Martin Cohn was a defendant and cross-complainant in the District Court, but is no longer a party to this action.

Petitioners are unaware of any parent or subsidiary corporations of the corporate parties set forth above.

> *argued that it had been finalized earlier,* and petitioners argued that it was never finalized. [Emphasis added.]

Thus, the Respondents freely *concede* that the Petitioners had absolutely no notice from the pleadings, pre-trial statement or any other source that the Respondents were suing on a *1983* contract.

Having made these concessions, the Respondents offer *not one, single citation* of authority to refute the abundant authorities cited in the Petition, and offer no explanation as to why this Court's *Oscanyan v. W.R. Arms Co.* [103 U.S. 261, 263-266 (1881)] decision may be disregarded.

Instead, the Respondents appear to be arguing that a jury may make any decision it wants, regardless of whether the defendant has been given fair notice of the claims being made against him, and regardless of whether the defendant has been given a meaningful opportunity to intelligently respond to those charges at trial.

Since **both** the trial court *and* the Ninth Circuit seem to have accepted this novel and frightening contention, the Petitioners respectfully submit that there is a clear and urgent need for this Court to instruct the lower courts as to the Due Process implications of disregarding pre-trial statements and judicial admissions.

B. Grounds for Granting Petition Amply Demonstrated

For reasons best known to themselves, the Respondents have characterized the Petitioners' Petition as "frivolous."

Clearly, nothing could be further from the truth.

The actions of both the Ninth Circuit and the District Court clearly conflict with this Court's decisions in *Oscanyan v. W.R. Arms Co.* [103 U.S. 261, 263-266 (1881)] and *Gasoline Prods. Co. v. Champion Ref. Co.* [283 U.S 494, 500 (1931)]. Thus, ample grounds for granting the Petition exist under Supreme Court Rule 10.1(c).

As is set forth both above, and in the Petition itself, the Ninth Circuit's decision:

> . . . . has so far departed from the accepted and usual exercise of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.
>
> Supreme Court Rule 10.1(a).

CONCLUSION

Unless defendants receive fair and effective notice of the charges made against them, the Due Process Clause becomes a dead letter, and we may as well return to trial by combat – the results could be no less arbitrary, and the process would probably be more expeditious.

Petitioners respectfully submit that the Petition should be granted, both to maintain the integrity of the

judicial process, and to provide the lower courts with necessary guidance on the Due Process issues raised by the Petition.

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